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Case No.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

KEITH and MARY HALL,

Petitioners,

v.

INDIANA DEPARTMENT OF STATE REVENUE

and KENNETH L. MILLER, Commissioner,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF INDIANA

APPENDIX

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IN THE

SUPREME COURT OF INDIANA

KEITH AND MARY HALL,	)
	)
Petitioners,	)
	)
v.	)
	)
INDIANA DEPARTMENT OF STATE REVENUE and KENNETH L. MILLER, COMMISSIONER,	)
	)
Respondents.	)

Cause No. 49S10-9503-TA-336

APPEAL FROM THE INDIANA TAX COURT
The Honorable Thomas G. Fisher, Judge

December 27, 1995

SHEPARD, Chief Justice.

The Indiana Department of State Revenue assessed over eleven million dollars in drug taxes against a couple who illegally possessed some 300 pounds of marijuana. The couple now seeks to avoid that tax liability by claiming the assessment

was a second jeopardy for the same offense. We conclude that they may not.

I. History of the Case

On February 12, 1993, police entered and searched the home of petitioners Keith and Mary Hall. During their inspection of the Halls' property, police discovered a bale of marijuana weighing approximately 300 pounds. They arrested the Halls and charged them with felony possession of marijuana.

Four days later, appellee Indiana Department of State Revenue assessed the Controlled Substances Excise Tax (CSET) against the Halls in the amount of $5,691,320.[1] The Department also assessed a 100 percent penalty because the Halls' did not pay the CSET when they first possessed

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[1]The Department calculated the CSET by multiplying the weight of the marijuana, roughly 142,283 grams, by the statutorily prescribed amount of $40 per gram. Ind. Code Ann. § 6-7-3-6 (West Supp. 1994).

the drug. Ind. Code Ann. § 6-7-3-11(a) (West Supp. 1994). The Halls' total CSET liability was thus $11,382,640.[2] On the same day, the Marion County Sheriff's Department garnished Mary's wages and seized the Halls' property as partial payment of their CSET liability. Appellant's Petition to Set Aside Final Determination, ¶ 2.

Subsequent to the assessment, Keith pled guilty to the charge of possessing marijuana and was convicted of a class D felony. The State dismissed the criminal charge against Mary.

The Halls sent a letter of protest to the Department, contesting their tax liability. The Department held a hearing and denied the Halls' protest. Subsequently, the Halls petitioned the Indiana Tax Court for review of the assessment, claiming the CSET violated their privileges against self-incrimination, as well as their double jeopardy, due process and

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[2]Interest immediately began accruing at the rate of $1,091.49 per day.

equal protection rights afforded by the United States and Indiana Constitutions.[3]

On October 11, 1994, the Tax Court issued its opinion in this action and three companion cases addressing the same issues. Hall v. Indiana Dep't of State Revenue (1994), Ind.Tax, 641 N.E.2d 694; Bailey v. Indiana Dep't of State Revenue (1994), Ind.Tax, 641 N.E.2d 695; Clifft v. Indiana Dep't of State Revenue (1994), Ind.Tax, 641 N.E.2d 682; Hayse v. Indiana Dep't of State Revenue (1994), Ind.Tax, 641 N.E.2d 698. The court ruled that the CSET did not violate the Halls' privileges against self-incrimination or their rights to equal protection and procedural due process. The court did conclude, however, that the CSET was Keith's second jeopardy, imposed in violation of the Fifth Amendment, and set aside his tax liability. It held

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[3]The Halls do not question the constitutional validity of the CSET under the Indiana Constitution in their appeal to this Court. Moreover, they presented no cogent state constitutional claim before the Tax Court.

further that no violation of Mary's right against double jeopardy occurred because she had suffered no criminal sanction before or after her CSET assessment.

Both the Halls and the Department petitioned this Court for review, which we granted. The following issues are presented:

1. Whether the CSET assessment was a second jeopardy in violation of the Halls' double jeopardy rights under the Fifth Amendment to the U.S. Constitution;

2. Whether the CSET compels self-incrimination in violation of the Fifth Amendment to the U.S. Constitution; and,

3. Whether the CSET assessment abrogated the Halls' procedural due process rights afforded by the Fourteenth Amendment to the U.S. Constitution.

II. Constitutionality of the CSET

Like the taxpayer in today's case of Bryant v. State (1995), Ind., ___ N.E.2d ___, the Halls claim their CSET

assessment was the second jeopardy imposed against them for the same offense. In Bryant, we followed the U.S. Supreme Court's recent analysis in Montana Dep't. of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994), and concluded that a CSET assessment is a jeopardy. We reached this decision only after evaluating the CSET's deterrent purpose, high rate of taxation, prerequisite of the commission of a crime and penal nature objectives. Ultimately, we concluded that, when combined with the CSET's criminal sanction, Bryant had indeed been twice placed in jeopardy.

Because the nature of the Halls' claim mirrors that of Bryant, our Bryant analysis is applicable. We note that Mary was subjected to neither criminal prosecution nor punishment, and therefore conclude the CSET was her only jeopardy. Her Fifth Amendment rights were not offended. By contrast, Keith was convicted for felony drug possession after the Department's CSET assessment. The CSET was therefore his

first jeopardy and the criminal action a second jeopardy in violation of the Double Jeopardy Clause.[4]

The Halls also argue that the CSET unconstitutionally compels self-incrimination and that the tax assessment denied their rights to procedural due process. We addressed issues identical to these in today's decision in Clifft v. Indiana State Dep't. of Revenue (1995), Ind., ___ N.E.2d ___. The analysis emerging from Clifft leads us to hold that the CSET violates neither the Halls' privilege against self-incrimination nor their

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[4]Keith lost his $40,000 in the wake of a jeopardy assessment just as Bryant suffered seizure of assets including his home in the immediate aftermath of the jeopardy assessment issued to him. Such is characteristic of the jeopardy assessment. It constitutes a civil judgment and may lead to seizure as payment just as a conviction in criminal court may lead to fines and incarceration. It is this similarity that leads us to conclude that assessment is the point at which jeopardy attaches for Fifth Amendment purposes.

rights to procedural due process afforded by the Fifth and Fourteenth Amendments.

III. Conclusion

We affirm the decision of the Tax Court with respect to the Halls' self-incrimination and due process claims. We affirm the Tax Court's denial of Mary's double jeopardy claim. We reverse as to Keith's double jeopardy claim and reinstate the CSET assessment.[5]

Dickson and Selby, JJ., concur.

DeBruler, J., concurs in result and dissents with separate opinion to follow.

Sullivan, J., concurs and dissents with separate opinion.

SULLIVAN, Justice, concurring and dissenting.

As explained in part II of my dissent today in State v. Bryant (1995), Ind., ____ N.E.2d ____ (Sullivan, J., dissenting),

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[5]Keith's criminal conviction is not before us in this tax appeal therefore not subject to disposition here.

I believe the majority errs in holding that an administrative assessment of a tax can constitute a first punishment for double jeopardy purposes.[6] As such, I believe that Keith Hall's criminal conviction is not contrary to the Double Jeopardy Clause. However, payment of the CSET assessed would constitute a second punishment of Keith Hall and would therefore be barred by Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994) (tax on the possession of illegal drugs assessed after the state has imposed a criminal penalty for the same conduct violated Double Jeopardy Clause).

I agree with the majority that no second jeopardy occurred in Mary Hall's case and that the CSET violates neither

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[6]If we were to proceed under the alternative approach I describe in part III of my Bryant dissent, I would remand to the Tax Court for determination of when jeopardy attached, i.e., when evidence was first presented to a trier of fact in the Halls' contest of the assessment. If that occurred prior to jeopardy attaching in Keith Hall's criminal prosecution, then the result would be the same as the majority reaches here.

the Halls' privilege against self-incrimination nor their due process rights.

DeBRULER, Justice, concurring and dissenting.

I would affirm the entire decision of the Tax Court in this case. Mary's double jeopardy claim is properly denied in light of the fact that she was not subjected to a first jeopardy in the criminal prosecution which was initiated and then dismissed. Keith's double jeopardy claim, however, has merit. At the time the Tax Court ruled, Keith had been punished as a result of the criminal proceeding against him, and property of Keith and Mary worth roughly $40,000 had been seized by the Marion County Sheriff pursuant to the tax warrant the Department issued with its jeopardy assessment. I agree with the Tax Court that the holding in Department of Revenue v. Kurth Ranch, __ U.S. __, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), commands the conclusion reached by the Tax Court that further tax collection efforts by the Department would subject Keith to a second punishment

prohibited by the Double Jeopardy Clause. I find this case different from today's case of **Bryant v. State (1995), Ind., 660 N.E.2d 290**, in which the taxpayer, while being first subjected to a punishment in a criminal prosecution, had at no time paid any of the tax nor had the taxpayer been subject to any collection efforts by revenue agents.

IN THE

SUPREME COURT OF INDIANA

ROSS BRYANT,)
)
Appellant (Defendant Below),)
)
v.)
)
STATE OF INDIANA,)
)
Appellee (Plaintiff Below).)

Cause No.: 27S04-9409-CR-865
December 27, 1995

SHEPARD, Chief Justice.

We confront several questions of first impression involving Indiana's new drug tax. The State imposed both civil and criminal sanctions on appellant Ross Bryant for his failure to pay the Indiana Controlled Substance Excise Tax (CSET).[7] He appealed the criminal penalty, claiming he was twice punished for the same offense. We hold that the civil and

[7]Ind. Code Ann. §§ 6-7-3-1 to 6-7-3-17 (West Supp. 1994).

criminal penalties were each jeopardies, and that both cannot be imposed without violating the Double Jeopardy Clause of the United States Constitution.

I. Statement of Facts

In August 1992, Grant County Sheriff's deputies responded to an alarm at Bryant's home. Discovering an open door with fresh pry marks on it, they entered the dwelling and searched it. There was no one in the home, but police found over 250 marijuana plants in the basement, outhouse and garden. Officers then obtained a warrant and completed a more thorough search which uncovered marijuana seeds, dried marijuana and other drug paraphernalia. When police questioned Bryant upon his return, he confessed that the marijuana was his and that he was growing it for his own use. Police then arrested Bryant and transported him and the objects seized to the Grant County Jail.

The deputies next contacted the Indiana Department of Revenue to report their findings. The Department dispatched a

special agent to the jail to determine the amount of Controlled Substance Excise Tax owed by Bryant.[8] The agent weighed the marijuana and assessed a tax of $83,680.[9] The agent then met with Bryant and demanded payment. Because Bryant did not immediately pay the CSET, the agent served him with a "Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand" which required payment of the CSET plus

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Ind. Code Ann. §§ 6-7-3-8, 11 (West Supp. 1994). The CSET, which went into effect on July 1, 1992, imposes a tax on the delivery, possession or manufacture of a controlled substance in Indiana in violation of Ind. Code ch. 35-48-4 or 21 U.S.C. §§ 841-852. Ind. Code Ann. § 6-7-3-5 (West Supp. 1994).

The marijuana seized from Bryant weighed 2092 grams. The CSET prescribes that schedule I, II, and III controlled substances (including marijuana) are taxed at a rate of $40 per gram and a proportionate amount for each fraction of a gram. Ind. Code Ann. § 6-7-3-6 (West Supp. 1994). Schedule I, II and III substances are identified at Ind. Code Ann. §§ 35-48-2-4, -6, and -8 (West Supp. 1994).

a 100 percent penalty for nonpayment of the tax.[10] Bryant's total obligation to the State was thus $167,360. The very next day, the Department levied on Bryant's "checking and/or savings accounts, contents of safe deposit boxes, money market accounts, certificates of deposit, . . . [and] any other evidence of indebtedness" as payment on this obligation. (R. 456.) Counsel informed us at oral argument that the Department also seized Bryant's home.

The State next charged Bryant with failure to pay the CSET, a class D felony;[11] growing and cultivating more than 30

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[10]Ind. Code Ann. § 6-7-3-11(a) (West Supp. 1994) provides: "A person may not deliver, possess or manufacture a controlled substance subject to the tax under this chapter unless the tax has been paid. A person who fails or refuses to pay the tax imposed by this chapter is subject to a penalty of one hundred percent (100%) of the tax in addition to the tax."

[11]Ind. Code Ann. § 6-7-3-11(b) (West Supp. 1994) declares: "A person who knowingly or intentionally delivers, possesses, or manufactures a controlled substance without having paid the

grams of marijuana, a class D felony;[12] maintaining a common nuisance, a class D felony;[13] and, possession of less than 30 grams of marijuana, a class A misdemeanor.[14]

In April 1993, Bryant was convicted on all four counts. The court sentenced him to two and a half years in prison on each of the four felony counts and one year for misdemeanor possession. His sentences were to run concurrently, with one year suspended to probation.

Bryant subsequently appealed to the Indiana Court of Appeals. After briefing was completed, I transferred the case to

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tax due commits a Class D felony. This subsection does not apply to a person in violation of IC 35-48-4-11, if the violation is a misdemeanor." (The second sentence of this subsection exempts first-time offenders involving no more than thirty grams of marijuana, or two grams of hash oil or hashish.)

[12]Ind. Code Ann. § 35-48-4-11(2) (West 1986).

[13]Ind. Code Ann. § 35-48-4-13 (West Supp. 1994).

[14]Ind. Code Ann. § 35-48-4-11(1) (West 1986).

this Court pursuant to the authority granted me by Ind.Appellate Rule 4(D).

Bryant raises the following issues on appeal:

1. Whether the State violated the Double Jeopardy Clause by assessing both the CSET's civil and criminal sanctions against Bryant;[15]

2. Whether the trial court erroneously convicted Bryant for failure to pay the CSET based on evidence that he grew and cultivated marijuana;

3. Whether the trial court erred when it admitted evidence obtained in the search of Bryant's home;

4. Whether the trial court erred by admitting evidence of Bryant's prior convictions; and,

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[15]Bryant also alleges that the CSET violates the federal and state prohibitions against excessive fines and the state prohibition against imprisonment for a debt. U.S. Const. amend 8; Ind. Const. art. I, §§ 16, 22. Because we reverse Bryant's CSET conviction, we need not address these issues..

5. Whether there was sufficient evidence to convict Bryant of possessing marijuana and maintaining a common nuisance.

We hold the Department's assessment of the CSET against Bryant was a jeopardy. His criminal prosecution for failure to pay the CSET constituted a second jeopardy in violation of his double jeopardy rights under the United States Constitution as did his criminal prosecutions for growing and possession marijuana. Accordingly, we vacate his conviction on that count.[16] We affirm his convictions on the three remaining counts.

II. The CSET and Double Jeopardy

Bryant claims that because the State assessed the CSET and its 100 percent penalty for nonpayment against him and later convicted him of a felony for nonpayment, it violated his double jeopardy rights under the United States and Indiana

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[16]Thus, we need not address the second claim listed above.

Constitutions.[17] U.S. CONST. amend. V; IND. CONST. art. I, § 14.[18]

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This clause is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). It protects a person from suffering (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969).

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[17]Bryant characterizes the tax and civil penalty for nonpayment as one punishment or jeopardy. Accordingly, we consider these provisions in tandem.

[18]Article I, § 14 provides: "No person shall be put in jeopardy twice for the same offense." Bryant has presented no cogent argument with respect to his Indiana claim. He thus presents no viable state constitutional basis for his appeal. St. John v. State (1988), Ind., 523 N.E.2d 1353, 1355.

Jeopardy is, in its constitutional sense, a technical term which has traditionally applied only to criminal prosecutions. Browns v. Evans, 190 U.S. 180 (1983). Departing from this historical rule, however, the U.S. Supreme Court has held in recent years that particular forfeitures, civil fines and financial exactions can be "jeopardies." Montana Dep't of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994); United States v. Halper, 490 U.S. 435 (1989). Cf. Austin v. United States, 113 S.Ct. 2801 (1993). In determining whether a jeopardy has occurred, the Court has said that the sanction's label of "criminal" or "civil" is not controlling. Halper, 490 U.S. at 447; see also United States v. Haywood, 864 F.Supp. 502, 506 (W.D.N.C. 1994) (description of sanction as "civil" does not foreclose possibility it is a jeopardy). Rather, the test is whether the civil sanction constitutes a "punishment." Kurth Ranch, 114 S.Ct. at 1946. When the sanction serves the goals of punishment rather than the remedial purposes of compensating the government for its loss, it is a "punishment" and thus a "jeopardy" within the

Double Jeopardy Clause. Id. The sanction's essence as a punishment can be identified "only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." Halper, 490 U.S. at 447.

A. Is the CSET's Civil Sanction a Punishment?

The Supreme Court recently delineated the analysis for determining whether a tax is a punishment in Kurth Ranch, 114 S.Ct. 1937, a case bearing strong resemblance to the one before us. In Kurth, the Montana Department of Revenue sought to impose both criminal and tax penalties for the same possession of marijuana. In determining whether the tax was a "punishment" and thus a jeopardy under double jeopardy analysis, the Court examined four factors: the tax's deterrent purpose (as opposed to revenue purpose), its high rate, its prerequisite of the commission of a crime before assessment, and the nature of the tax. Ultimately, the Court found that when considered in tandem these factors revealed that the Montana

tax was a punishment and thus a second jeopardy imposed on the taxpayer in violation of the Double Jeopardy Clause.

To apply the Kurth analysis, we examine first the purpose and rate of the CSET.[19] It is apparent that the CSET is aimed at least partly towards deterrence. One who pays the CSET receives a receipt that admonishes him that delivery, sale, possession or manufacture of a controlled substance is a crime. Ind. Code Ann. § 6-7-3-10(a) (West Supp. 1994). The

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[19]Ind. Code Ann. § 6-7-3-13 (West Supp. 1994) characterizes the initial assessment of the tax as a "jeopardy assessment." The Department claims the "jeopardy" label does not connote a "jeopardy" for double jeopardy purposes. Based on our conclusion that the CSET is a jeopardy, it is unnecessary to evaluate this delineation. Moreover, we will not address here whether the assessment of the tax itself was a jeopardy independent of the 100 percent penalty and criminal charge, as that issue was not raised on appeal. Rather, for today's purposes we consider the tax and civil penalty assessed by § 6-7-3-11(a) as one sanction.

taxpayer is required to show this receipt to officials to prove he has paid the tax, but the receipt is valid for only forty-eight hours. Ind. Code Ann. § 6-7-3-10(b) (West Supp. 1994). A taxpayer who possesses the same drug for over forty-eight hours must therefore repay the tax every forty-eight hours to continue to possess a valid receipt and thereby avoid the CSET's additional sanctions. Both the receipt's admonition and the limited period for which it is valid suggest a deterrent purpose.

Second, just as the Kurth Court found the high rate of the Montana tax demonstrated its punitive character, we find the CSET's rate similarly revealing. The Montana tax was imposed at the rate of $100 per ounce, roughly eight times the market value of the marijuana taxed. Kurth Ranch, 114 S.Ct. at 1943, n.12. Indiana's CSET imposes a tax of $40.00 per gram, or $1,133.96 per ounce. This is a rate of over ninety times the

market value and more than eleven times the rate imposed in Kurth.[20] It indicates a punitive character.

The third factor the Kurth Court found suggestive of the tax's punitive nature was the fact that it was conditioned on the commission of a crime and was exacted only after the possessor was arrested. The Court found these conditions "'significant of [the tax's] penal and prohibitory intent rather than the gathering of revenue.'" Kurth Ranch, 114 S.Ct. at 1947 (quoting United States v. Constantine, 296 U.S. 287, 295 (1935)). The CSET is similarly conditioned on the commission of a crime. It is imposed only on individuals who deliver, possess or manufacture controlled substances "in violation of

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[20]The Kurth Court identified the market value of marijuana as $200 per pound, which equals $12.50 per ounce or $.44 per gram. Kurth Ranch, 114 S.Ct. at 1943, n.12. We use this same market value to compare the rate of the CSET with the street value of Bryant's marijuana. There is no contrary evidence in the record.

IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852." Ind. Code Ann. § 6-7-3-5 (West Supp. 1994).

Moreover, while the plain language of the statute does not limit the imposition of the CSET to a time after arrest, this is its effect. The law does say that a taxpayer owes the tax regardless of whether she is arrested. The Department assesses the tax, however, only when police contact it to report an individual who is in custody for the delivery, possession or manufacture of a controlled substance. The resemblance between the two schemes seems more compelling than the difference.

Finally, the Kurth Court found that because the Montana tax was characterized as a "property" tax but was assessed only after the controlled substance was confiscated, the tax possessed none of the indicia of "a species of a property tax." Kurth Ranch, 114 S.Ct. at 1948. Likewise, the CSET is so far removed from a normal excise tax that it must be classified as a punishment. An excise tax is one which is imposed upon the

performance of an act or the enjoyment of a privilege. Black's Law Dictionary 506 (5th ed. 1979). As in Kurth, however, the Department routinely imposes the CSET only after a taxpayer's drugs have been confiscated. The taxpayer neither enjoys a privilege nor performs an act at the time of taxation. The CSET cannot therefore be classified as a normal excise tax.[21]

The CSET differs from a traditional excise tax in another respect. The rate of the tax so significantly outreaches that of other excise taxes in this state that its classification as a normal excise tax is impossible. No other Indiana excise tax imposes such a severe civil penalty for nonpayment. See, e.g.,

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[21] Unless the Department independently finds and assesses drug possessors without police intervention, this will always be the case. Evidence at trial suggested that the Department does not conduct such independent investigations and it did not do so in Bryant's case.

Ind. Code Ann. § 6-7-1-24(a)(2) (West Supp. 1994) (failure to pay cigarette tax can result in fifty percent penalty).

The CSET is not identical to the Kurth tax in every respect, but the factors outlined in Kurth do not create a bright line. After evaluating the CSET as a whole, like the Court in Kurth, we conclude that "this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." Kurth Ranch, 114 S.Ct. at 1948. Accordingly, the assessment of the CSET and its 100 percent penalty against Bryant was a punishment and thus a jeopardy.

B. Were the CSET's Civil and Criminal Sanctions Multiple Punishments for the Same Offense?

Having concluded the CSET's civil sanction was a jeopardy, we must now determine whether the imposition of the CSET's civil and criminal penalties constituted multiple punishments for the same offense. Because the CSET

imposes its civil and criminal penalties in two separate proceedings, we are not required to address the permissibility of "multiple punishments" imposed in the same proceeding. See, e.g., Kurth Ranch, 114 S.Ct. at 1947, n. 21; cf. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Rather, we must address whether the CSET's criminal and civil punishments violate the double jeopardy prohibition against a second prosecution for the same offense after conviction or acquittal because it imposes separate sanctions in successive proceedings.[22]

In determining whether the two offenses are the same, we apply the test first announced in Blockburger v. United

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[22]Even though the tax proceeding against Bryant began at the same time as the criminal prosecution, this does not make it a single proceeding raising the issue of "multiple punishments" for the "same offense." As in Kurth, the fact that the two were pending contemporaneously is not determinative. Kurth Ranch, 114 S.Ct. at 1947, n. 21.

States, 284 U.S. 299 (1932), and recently revived in United States v. Dixon, 113 S.Ct. 2849 (1993).[23] Where the same act or transaction constitutes a violation of two distinct statutory provisions, "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not. If each statute requires proof of an additional fact which the other does not," the offenses are not the "same offense" for double jeopardy purposes. Blockburger, 284 U.S. at 304. For example, a state

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[23]Five justices of the U.S. Supreme Court expanded the "same offense" analysis of Blockbuster in the 1990 decision of Grady v. Corbin, 495 U.S. 508 (1990). Grady established a second prong to the traditional Blockburger test under which courts were required to analyze whether the "conduct" underlying the offenses was the same, in which case a subsequent prosecution would be barred notwithstanding differences in the required elements. This decision was overruled by United States v. Dixon, 113 S.Ct. 2849 (1993).

violates double jeopardy protection when it punishes a defendant for a greater offense and a "lesser included offense." That is, if the lesser included offense requires no proof beyond that required for the greater offense, the two are the "same offense" for purposes of the Double Jeopardy Clause.[24] There are, however, similar offenses which do not violate the "same elements" test. Crimes which possess overlapping proof are

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when the Court reestablished the primacy of the traditional Blockburger analysis.

[24]See, e.g., Brown v. Ohio, 432 U.S. 161, 167-68 (1977), where the U.S. Supreme Court applied this "lesser included offense" analysis to the crimes of joyriding and auto theft. The Court concluded that a prosecutor who has established auto theft necessarily has established joyriding as well. Accordingly, they were the "same offense." The Court expanded this analysis in Harris v. Oklahoma, when it evaluated whether one offense was a species of a lesser-included offense of the other. Harris v. Oklahoma, 433 U.S. 682 (1977) (finding robbery a lesser-included offense when felony murder conviction required proof of robbery).

not conclusively double jeopardies. The conduct proved may be "'one and the same'" so long as each offense possesses "'an element not embraced in the other.'" Dixon, 113 S.Ct. at 2860 (quoting Gavieres v. United States, 220 U.S. 307, 345 (1911)).

Employing the "same elements" analysis, we find that the CSET's civil and criminal sanctions are punishments for the same offense. Both punishments require that a person deliver, possess or manufacture a controlled substance without having paid the CSET to be subject to prosecution. The only distinction between the punishments is found in the criminal sanction imposed for nonpayment in subsection (b) of § 6-7-3-11. This provision requires a mens rea of "knowingly or intentionally" for criminal conviction. The CSET's civil sanction requires no mens rea. However, its elements are identical to the criminal sanction's elements in all other respects. Because the civil penalty invoked by subsection (a) of the statute requires no elements other than those included in the criminal

penalty found in subsection (b), these subsections are two punishments for the same offense.

C. Which Jeopardy is Barred as the Second Jeopardy?

The determination of when jeopardy attaches is the lynchpin for concluding which jeopardy is barred as a second jeopardy. Crist v. Bretz, 437 U.S. 28, 38 (1978). Consequently, we turn to the question of which CSET sanction was Bryant's first jeopardy and which was the second jeopardy prohibited by the Fifth Amendment. To resolve this question we must settle when jeopardy attaches in a civil proceeding. Of course, the U.S. Supreme Court has not considered this question since its decision just last year in Kurth. Thus, we write on largely a clean slate.[25] The Court has, however, enumerated factors and

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[25]In fact, only a few courts have addressed when jeopardy attaches in a civil proceeding. See, e.g., United States v. Sanchez-Escareno, 950 F.2d 193, 201 (5th Cir. 1991) (until government attempts to collect or does collect civil fines, mere imposition of fines does not constitute punishment for double

policies underlying attachment which will help identify the point when jeopardy attached in this action.

Although the Fifth Amendment declares that no person shall be twice put in jeopardy of life or limb, this constitutional prohibition is not against being twice punished, but is against twice being put in jeopardy. Abney v. United States, 431 U.S. 651 (1977). The Double Jeopardy Clause thus refers to the risk that a person will, for a second time, be convicted of the same offense. Id. The notion that "jeopardy" is "risk" is the very core of double jeopardy jurisprudence. Breed v. Jones, 421 U.S. 519 (1975). Where a risk of a determination of guilt exists, for example, jeopardy attaches. See, e.g., Serfass v. United States, 420 U.S. 377 (1975); see also Price v. Georgia,

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jeopardy purposes); United States v. Park, 947 F.2d 130 (5th Cir. 1991) (jeopardy attaches when forfeiture proceeding begins); United States v. Torres, 28 F.3d 1463 (7th Cir. 1994) (holding jeopardy did not attach in drug forfeiture proceeding where defendant asserted no claim to seized drug money).

398 U.S. 323 (1970) (jeopardy is the risk of trial and conviction, not punishment). These cases are consonant with the well-known rule that jeopardy attaches when a jury has been impaneled and sworn. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

Using the point at which there is a risk of conviction as the moment when jeopardy attaches for Fifth Amendment purposes assures that a person is not forced to endure the personal strain, public embarrassment, and expense of a trial more than once for the same offense. The Double Jeopardy Clause achieves this result by effectively dictating that the government cannot make multiple attempts to convict an individual for an alleged offense, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Benton v. Maryland, 395 U.S. 784, 796 (1969); see also Breed, 421 U.S. at 530. Accordingly, it is essential to

determine the time of attachment to protect promptly the accused's rights to finality of judgment, to minimization of exposure to the ordeals of trial and to continue with a chosen jury. Crist, 437 U.S. at 38; see also United States v. Jorn, 400 U.S. 470 (1971) (constitutional policy of finality inherent in Fifth Amendment). A court's conclusion that jeopardy attached at a specific point reflects its judgment that the constitutional policies underpinning the Double Jeopardy Clause are implicated at that stage of the proceeding. Jorn, 400 U.S. at 480.

We conclude that jeopardy first attached when the Department served Bryant with its Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand. At that moment, Bryant faced more than a risk of being found guilty; he had actually been found guilty. The assessment itself was a judgment against Bryant for the CSET and its 100 percent nonpayment penalty. This judgment enabled the Department to levy on Bryant's property immediately, and the Department

exercised that authority the day after it issued Bryant's jeopardy assessment. To hold jeopardy attached at any point later than assessment would give the Department latitude to subject the taxpayer to the ordeal of assessment and levy multiple times for the same offense.[26] That would be contrary to the constitutional policies underlying the Double Jeopardy Clause.

The dissent suggests that finding jeopardy attached at assessment forecloses prosecution. This is correct so long as

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[26]The only other options for attachment are the time of actual collection or when a taxpayer appeals the assessment. Attachment cannot be said to occur on appeal or at collection because the taxpayer is inherently at risk of a determination of guilt and of losing his property from the moment of assessment. Furthermore, if we were to find it attached when a taxpayer appeals the assessment, the defendant would possess the luxury of choosing which jeopardy was his first; he would initate his appeal only where his tax liability was minor compared to his potential criminal penalty and would demand a speedy trial when his tax liability was significant compared to his potential criminal liability.

the State prosecutes the defendant after the Department assesses the CSET. We know from oral argument on this cause, however, that the Department does not conduct independent investigations, searching for drug offenders. Rather, it learns of an offense only when contacted by the police or prosecutor. This situation creates the opportunity for discussion between the Department and law enforcement authorities as to who will proceed first. Moreover, it seems plain enough for Fifth Amendment purposes that, from the citizen's point of view, it is irrelevant whether penalties imposed by one branch of the government foreclose penalties by another branch.

In any event, if there is any problem of coordination between the Department and law enforcement authorities (and what we were told at oral argument suggests there is none), the General Assembly may simply amend the statute to require the Department and prosecutor to consult with one another about who should go first.

The CSET assessment was Bryant's first jeopardy. The moment the jury was sworn in his criminal trial for nonpayment of the CSET a second jeopardy attached. Crist, 437 U.S. at 38. Accordingly, the Double Jeopardy Clause barred Bryant's criminal prosecution for nonpayment. We vacate the conviction for failure to pay the CSET.

Moreover, having concluded the CSET is a jeopardy, Bryant's convictions for growing more than 30 grams of marijuana and possessing less than 30 grams of marijuana were also subsequent jeopardies barred by the Double Jeopardy Clause. As we explain today in Clifft v. Indiana Dep't of State Revenue (1995) Ind., ___ N.E.2d ___, subsequent prosecutions under the criminal law for the same drug offenses twice places a defendant in jeopardy. We therefore vacate Bryant's criminal convictions.

III. The Warrantless Search of Bryant's Home

This case presents another novel issue unrelated to the CSET and double jeopardy. Bryant contends the trial court

committed reversible error when it admitted evidence obtained in the police search of his home, saying it was illegally obtained in violation of the Fourth Amendment to the U.S. Constitution.[27] The State contends that exigent circumstances justified the warrantless search because officers reasonably believed a person inside Bryant's home may have been in need of aid and because the deputies possessed probable cause to believe a burglary was in progress.

The Fourth Amendment provides each person the right to be secure in his or her person, houses, papers and effects against unreasonable searches and seizures. U.S. CONST. amend. 4.; IND. CONST. art. I, § 11. Generally, a search or

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[27]Police did not possess a warrant for the initial search of the home, but they obtained one before the second search, during which they seized the marijuana and drug effects. Bryant also contends that admission of this evidence violated Article I, § 11 of the Indiana Constitution, but does not present any cogent argument concerning this claim. Accordingly, the claim is waived. St. John, 523 N.E.2d at 1355.

seizure may only be conducted pursuant to a lawful warrant. Arkansas v. Sanders, 442 U.S. 753 (1979); Taylor v. State (1992), Ind., 587 N.E.2d 1293. The cardinal principle in search and seizure jurisprudence therefore is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable . . . - subject only to a few specifically established and well-delineated exceptions." Fair v. State (1993), Ind., 627 N.E.2d 427, 430 (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978)). Exigent circumstances compelling quick action before a warrant can be obtained are recognized as such an exception. Michigan v. Tyler, 436 U.S. 499 (1978) (building on fire). The State bears the burden of proving the existence of exigent circumstances sufficient to justify the lack of formalities. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

The State initially argues that its warrantless search was justified because a person inside Bryant's home may have been in need of aid. The U.S. Supreme Court and this Court have

recognized a limited exception to the warrant requirement where an officer reasonably believes such circumstances exist. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967); Tata v. State (1986), Ind., 486 N.E.2d 1026. In cases employing this exception, however, police possessed objective evidence that a violent crime had or was about to occur. Hayden, 387 U.S. 294; Tata, 486 N.E.2d at 1028. There was no such evidence in this case. Officers did not find any evidence outside the home and did not hear any sound from the home which could reasonably lead them to conclude a person inside was in need of aid.[28] The warrantless search of Bryant's home cannot be justified on these grounds.

Until today, this Court had not considered the State's second argument: that police may enter a home when they reasonably believe a burglary may be in progress or has

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[28]When police arrived at Bryant's home, no one told them that a violent crime against a person had occurred or was imminent. Cf. Tata, 486 N.E.2d at 1028.

recently been committed. Numerous state and federal courts, however, agree that these are exigent circumstances excusing warrantless entry. See, e.g., Reardon v. Wroan, 811 F.2d 1025 (7th Cir. 1987); State ex rel. Zander v. District Court, 591 P.2d 656 (Mont. 1979) (warrantless entry necessary to protect property and determine whether suspect was hiding inside where police believed burglary was in progress); United States v. Salva, 978 F.2d 320 (7th Cir. 1992).

Our own Court of Appeals has also recognized this exception. B.P.O.E. # 576, Elks Club v. State (1980), Ind.App., 413 N.E.2d 660. These courts and other authorities generally agree that such an entry and search does not offend the Fourth Amendment because the emergency circumstances surrounding a potential burglary justify the action. See 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 6.6(b), at 706-707 (2d ed. 1987). We agree that police may enter private property to protect that

property when they reasonably believe the premises have recently been or are being burglarized.

Of course, any search conducted because police reasonably believe a burglary is in progress or has just occurred is limited to areas in which an intruder could reasonably conceal himself. Officers may not use the situation as an excuse to conduct a general search for evidence. State v. Crabtree, 655 S.W.2d 173 (Tenn.Crim.App. 1983). A search beyond the exigencies presented would violate the Fourth Amendment.

In Bryant's case, Grant County Sheriff's deputies entered the home after receiving an emergency call from a neighbor who reported that a home alarm was sounding. When deputies arrived at the scene, they observed fresh pry marks on an open door. They entered the house and conducted a protective sweep of the residence.

The totality of these circumstances reveals that exigent circumstances justified the search. The sounding alarm, fresh

pry marks and open door led police to a reasonable belief that a burglary was in progress or had recently occurred. The officers searched no more area than was reasonably necessary, but still discovered hundreds of marijuana plants in plain view. Admission of evidence found during the search was therefore not error.

IV. Admissibility of Bryant's Prior Convictions

During Bryant's trial, the State cross-examined him regarding his convictions for robbery and armed burglary thirty-five and forty years prior to his arrest. Bryant contends these convictions were too remote to be admissible.

The trial court has considerable latitude in admitting or rejecting evidence. Error in admitting evidence is not a basis for setting aside a conviction unless the erroneous admission was inconsistent with substantial justice or affects the substantial rights of the parties. Ind.Trial Rule 61; Fleener v. State (1995), Ind., 656 N.E.2d 1140.

Under our common law evidentiary rules,[29] a prior criminal conviction may be used for impeachment if it involved dishonesty or false statement or constituted what is commonly referred to as an "infamous crime" which would have rendered the witness incompetent to testify. Ashton v. Anderson (1972), 258 Ind. 51, 279 N.E.2d 210, 217. Bryant's convictions for robbery and burglary fall squarely within the Ashton "infamous crimes" which the trial court could rightfully admit for impeachment purposes. A question regarding the lapse of time between the conviction and the testimony to be impeached does not affect the admissibility of the conviction. Robinson v. State (1983), 446 N.E.2d 1287. Rather, the lapse of time from

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[29]We adopted the Indiana Rules of Evidence on January 1, 1994. Because Bryant's offense occurred in 1992, we will not evaluate his claim under Indiana Rule of Evidence 609 which bars the use of a prior conviction for impeachment purposes if the conviction is more than ten years old. Instead, we evaluate it under common law evidentiary principles.

the defendant's prior conviction is a matter for the jury to weigh in assessing the weight of the evidence and the credibility of the witness. Id. The trial court properly admitted evidence of Bryant's prior convictions.

V. Sufficiency of the Evidence

We do not reweigh the evidence or judge the credibility of the witnesses when considering a sufficiency question on appeal. Alfaro v. State (1985), Ind., 478 N.E.2d 670. These are matters exclusively within the province of the jury. Rather, we consider the evidence most favorable to the verdict, along with any reasonable inferences therefrom, to determine whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Moore v. State (1987), Ind., 515 N.E.2d 1099. We affirm if each element of the crime is supported by substantial evidence. Loyd v. State (1980), 272 Ind. 404, 398 N.E.2d 1260, cert. denied, 449 U.S. 881.

Bryant challenges his misdemeanor conviction for possession of marijuana, claiming he was not in exclusive possession of the property in which officers found two bags of dried marijuana and over 300 marijuana plants. We need not address this issue based on our conclusion that the conviction was a second jeopardy barred by the Double Jeopardy Clause. We note, nonetheless, that Bryant owned the home in which the marijuana was found and confessed to police that the marijuana was his. Various other drug paraphernalia found in Bryant's home compounded the evidence of his guilt. We conclude there was no evidence which could reasonably lead the court to believe someone other than Bryant possessed the drugs.[30] There was sufficient evidence to support Bryant's conviction.

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[30]At trial, Bryant claimed a former girlfriend had access to the home and that she could have been growing and using the marijuana. Based on the lack of substantive evidence of this

Bryant also challenges his conviction for maintaining a common nuisance, contending the State failed to prove he committed a continuous or recurring violation sufficient to constitute the "maintenance" of a common nuisance. The Code required the State to prove Bryant knowingly or intentionally maintained a building that was used for unlawfully keeping, offering for sale, selling or delivering a controlled substance described in § 35-48-4-8.5 to convict him of maintaining a common nuisance. Ind. Code Ann. § 35-48-4-13(b)(2) (West Supp. 1994). We have not previously addressed whether § 35-48-4-13 requires the State to prove continuous or recurring possession. We did conclude, however, that continuous or recurring possession was an element under a former statute on the grounds that the "maintains" or "maintaining" language of the act implicitly required proof of a continuing or recurring violation. Keeth v. State (1923), 193 Ind. 549, 550, 139 N.E.

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use or possession, we find, as did the trial court, that this contention has no merit.

589, 590.[31] Because § 35-48-4-13(b) contains this same language in its body and title, we hold the State must have proven Bryant's recurring or continuous violation.

At trial, the State presented evidence which proved Bryant possessed substantial amounts of marijuana, a complex growing system and a variety of drug paraphernalia employed to cultivate, preserve and use marijuana in his home. When coupled with Bryant's confession that he was growing the marijuana for his own use, this evidence was sufficient to prove continuing possession of a common nuisance.

VI. Conclusion

For the foregoing reasons, we vacate Bryant's convictions for failure to pay the CSET, growing and cultivating

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[31]The Indiana Court of Appeals reached the same conclusion under our current statute. Plowman v. State (1992), Ind.App., 604 N.E.2d 1219 (evidence of isolated or casual occurrence insufficient to sustain conviction for maintaining common nuisance).

marijuana and misdemeanor possession. We affirm his conviction for maintaining a common nuisance.

Dickson and Selby, JJ., concur.

DeBruler, J., concurs and dissents with separate opinion to follow.

Sullivan, J., dissents with separate opinion.

SULLIVAN, Justice, dissenting.

In Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994), the United States Supreme Court held that a proceeding initiated by the state of Montana to collect a tax on the Kurth family's marijuana crop was prohibited by the Double Jeopardy Clause where the Kurths had already been convicted in criminal court for possession of those drugs. Today our court holds that the mere assessment of a similar tax by the Indiana Department of State Revenue prior to trial for a related drug possession or dealing offense cuts off the ability of county prosecutors to obtain drug convictions and courts to

impose sentences. I believe the majority today extends the protection of the Double Jeopardy Clause further than the United States Supreme Court requires.[32]

While I do not agree in all the particulars, I do agree that the Indiana CSET bears enough resemblance to the Montana dangerous drug tax at issue in Kurth Ranch to implicate the Double Jeopardy Clause. While the courts of several other states have found their drug tax statutes sufficiently distinct

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[32]"[A]n increasingly popular tactic of those criminally charged with violating state and federal drug laws and correlatively subjected to forfeiture proceedings is to concede in the forfeiture proceedings at the earliest opportunity and, thereafter, seek to avoid criminal sanctions by moving to dismiss pending criminal charges on double jeopardy grounds." People v. Hellis, 211 Mich.App. 634, 536 N.W.2d 587, 592 (1995). The majority opinion goes further by proscribing criminal sanctions once drug tax administrative proceedings are initiated; the accused need not concede anything to avoid prosecution.

from the Montana tax to withstand scrutiny under Kurth Ranch, e.g., State v. Gulledge, 896 P.2d 378 (Kan. 1995); State v. Lange, 531 N.W.2d 108 (Iowa 1995); Milner v. State, 658 So.2d 500 (Ala.Civ.App. 1994); I find the majority's analysis persuasive that the CSET has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause. Kurth Ranch, 114 S.Ct. at 1945. Accord, Stennett v. State, 905 S.W.2d 612 (Tex.Ct.App. 1995).

II

Concluding that the Indiana CSET is sufficiently similar to the Montana dangerous drug tax to subject it to the constraints of the Double Jeopardy Clause does not mean, however, that this is the same case as Kurth Ranch. Indeed, this case is different from Kurth Ranch in at least one very important way - in Kurth Ranch, the taxpayer had first been convicted of the underlying drug offense and sought to avoid the subsequent imposition of the drug tax on double jeopardy grounds; here the taxpayer has first been assessed the drug

tax and seeks to avoid punishment for the underlying drug offense on double jeopardy grounds.

The majority contends that the order in which the state seeks to impose the criminal and tax punishments makes no difference - that the tax can be either a first or a second punishment, but in either case it is considered punishment for double jeopardy purposes. There is certainly authority for this position.[33] But I think we should tread cautiously in this area. First, the Montana tax could be imposed only after a criminal

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[33]Kurth Ranch, 114 S.Ct. at 1958 (Scalia, J., dissenting); United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994), amended by order, 56 F.3d 41 (1995); United States v. Sanchez-Escareno, 950 F.2d 193, 203 (5th Cir. 1991); F. Anthony Paganelli, "Constitutional Analysis of Indiana's Controlled Substance Excise Tax," 70 Ind.L.J. 1301, 1330 & n.217 (1995). But see United States v. $405,089.23, 56 F.3d at 41 (opinion of Ryner, J., dissenting from denial of rehearing en banc, joined by six other judges); United States v. Newby, 11 F.3d 1143, 1145 (3d Cir. 1993).

conviction and the Kurth Ranch majority expressly noted that it was not faced with "the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." Kurth Ranch, 114 S.Ct. at 1947 n.21. Second, the Supreme Court seems to emphasize the sequence in Kurth Ranch, several times making explicit reference to the fact that the imposition of the tax followed the imposition of the criminal sanction.[34] Third, as Justice DeBruler points out, the effect of

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[34]The Supreme Court's emphasis on the tax punishment constituting the second punishment is seen in the following passages:

> This case presents the question whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense.

Kurth Ranch, 114 S.Ct. at 1941 (footnote omitted) (emphasis supplied).

The third proceeding involved the assessment of the new tax on dangerous drugs.

Id. at 1942 (emphasis supplied) (the first proceeding was the criminal prosecution and the second was a civil forfeiture action).

This drug tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. Instead it is a second punishment within the contemplation of [the Double Jeopardy Clause] and therefore must be imposed during the first prosecution or not at all.

Id. at 1946 (emphasis supplied). While I acknowledge that this last sentence lends support to the majority's view that the drug tax can constitute a first punishment, it did not in Kurth Ranch and, for the reasons discussed in the text of my dissent, I do not think it prudent to extend this principle in the absence of the Supreme Court explicitly so holding.

holding that the tax can constitute a first punishment for double jeopardy purposes is to interdict a "power of the highest essential order," namely the power of the state to prosecute criminal behavior. In the absence of clear mandate from the Supreme Court, I think it highly inadvisable for us to hold that an administrative assessment of a tax can constitute a first punishment for double jeopardy purposes.[35]

III

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[35]Several alternatives are available. First, we could hold that the tax becomes a first punishment only when ordered by a court, i.e., only when the taxpayer has exercised his or her right to protest the assessment in court or the department of revenue has obtained judicial assistance in enforcing it. Second, we could hold that sentencing on the underlying criminal offense extinguishes any previously established CSET liability. Either of these approaches would be consistent with the outcome of Kurth Ranch and would not interfere with the power of our prosecutors to seek to bring drug possessors and dealers to justice.

The majority takes the position that Kurth Ranch requires that when a civil or administrative proceeding or sanction has the punitive characteristics that subject it to the constraints of the Double Jeopardy Clause, the established principles of Double Jeopardy jurisprudence apply regardless of whether the criminal prosecution and sentencing or the civil or administrative proceeding and sanction come first. Even if I agreed with the majority that Kurth Ranch prevents the state from prosecuting drug offenders if CSET has already been imposed - and I do not; see part II, supra - I can not agree with the way the majority seeks to implement this principle. The majority says that jeopardy attaches when the revenue department issues its assessment notice and demand. This cannot be right - the mere issuance of an administrative order cannot be sufficient to shut down completely the state's ability to prosecute drug offenders.

A

The Double Jeopardy Clause is violated by (i) a second prosecution for the same offense after acquittal or conviction (which I will refer to as "prosecution jeopardy"), or (ii) multiple punishments for the same offense (which I will refer to as "punishment jeopardy").[36] North Carolina v. Pearce, 395 U.S. 711, 717 (1969). And the factual patterns in this and the other

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[36]In United States v. Dixon, 113 S.Ct. 2849 (1993), Justice Scalia, writing for the majority, takes issue with Justice Souter who, in dissent, distinguishes between what I refer to as prosecution jeopardy and punishment jeopardy. Justice Scalia writes that "there is no authority, except Grady [v. Corbin, 495 U.S. 508 (1990)], for the proposition that [double jeopardy] has different meanings in the two contexts." Dixon, 113 S.Ct. at 2860. Dixon overruled Grady. However, the Scalia-Souter debate addressed substantive principles of double jeopardy law. I distinguish between prosecution jeopardy and punishment jeopardy only for what I think are obvious procedural differences in when jeopardy in respect of a prosecution attaches and when jeopardy in respect of punishment attaches.

cases before the court today generally involve three types of state actions: (i) a criminal prosecution for a drug possession or dealing offense; (ii) a criminal prosecution for the failure to pay the CSET; and (iii) an administrative (non-criminal) action to collect CSET due. Prosecution jeopardy arises or attaches in the first two types of actions at the time the jury is sworn or, in an action tried to the bench, at the time the fact finder begins to take evidence. Crist v. Bretz, 437 U.S. 28, 35 (1978) (jury trial); Serfass v. United States, 420 U.S. 377, 388 (1975) (bench trial); Maddox v. State (1952), 230 Ind. 92, 98, 102 N.E.2d 225, 228 (jury trial); State v. Proctor (1984), Ind.App., 471 N.E.2d 707, 708 (bench trial). See generally Joseph G. Cook, 3 Constitutional Rights of the Accused 2d §§ 23:17-23:25 (1986 & Supp. 1995). The cases are not so clear as to precisely when punishment jeopardy attaches but I have found no authority for holding that it attaches before an offender has commenced to serve a valid sentence. See generally United States v. DiFrancesco, 449 U.S. 117, 134 (1980); Coleman v.

State (1986), Ind., 490 N.E.2d 711, 715; Williams v. State (1986), Ind.App., 494 N.E.2d 1001, 1004, cert. denied 481 U.S. 1054 (1987); Arthur W. Campbell, Law of Sentencing 2d §§8:14-8:17 (1991 & Supp. 1994).

But because the concept of administrative or civil sanctions in general, and a tax in particular, constituting jeopardy is so new to the law,[37] there is little guidance as to when prosecution jeopardy or punishment jeopardy attach in such context. Indeed, the majority's analysis on this point is quite abbreviated.[38] Yet if we are to hold that at the moment of

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[37]The United States Supreme Court held for the first time that civil fines, forfeiture, and financial exactions styled as a tax can be penalties for crime in 1989, 1993, and 1994, respectively. Montana Dep't of Rev. v. Kurth Ranch, 114 S.Ct. 1937 (1994) (tax); Austin v. United States, 113 S.Ct. 2801 (1993) (forfeiture); United States v. Halper, 490 U.S. 435 (1989) (civil fines).

[38]The majority's only analysis on this point is that, at the point the department of revenue served the taxpayer with an

attachment, the state is interdicted from pursuing a criminal prosecution, ascertaining that moment of attachment becomes a vital inquiry.

I think we start with the basic principles that the mere filing of charges or conduct of pre-trial proceedings are not enough to implicate prosecution jeopardy and that the mere

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assessment notice and demand, "Bryant faced more than a risk of being found guilty; he had actually been found guilty." The majority offers no authority for this proposition and I reject it. It seems to me tantamount to saying that when a prosecutor files criminal charges, a criminal defendant has actually been found guilty. In both instances, the assessment and filing of charges merely represents the first step in a statutorily-prescribed regime. That the department is authorized to seize the taxpayer's property immediately does not change the analysis for me. I discuss this issue in greater detail in part III-C-2, infra. And to continue my analogy to criminal procedure, the state is also entitled to impose substantial infringements on the criminally accused's liberty and property following the filing of criminal charges.

pronouncement of sentence is not enough to implicate punishment jeopardy. As noted above, prosecution jeopardy does not attach, in a jury trial, until the jury is sworn, and, in a bench trial, until the fact finder begins to take evidence. I would analogize the administrative procedure for enforcing the CSET to the criminal bench trial and would find the imposition of the CSET to constitute a prosecution jeopardy at the point, but not before, the taxpayer exercises his or her rights to appeal an assessment, a hearing has been convened, and the fact finder has begun to take testimony. Similarly, I would not find the imposition of the CSET to constitute a punishment jeopardy unless and until the taxpayer has begun to pay the assessment.[39]

B

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[39]I make this point because there will be cases where the taxpayer will not contest the assessment. See part III-C-1, infra.

Indiana Code §6-7-3-13 (1993) provides that the Department of Revenue shall proceed to assess and collect CSET due under Ind.Code §6-8.1-5-3 (1993). Under 45 Ind.Admin.Code §15-5-8 (1992), the taxpayer may protest the assessment within a prescribed period of time and request a hearing. If a hearing is requested, the department is required to follow the hearing procedures specified in 45 Ind. Admin.Code §15-5-3. In contrast to the majority which holds that prosecution jeopardy attaches at the time the department makes its initial assessment, I would hold that no attachment occurs until the hearing or alternative procedures contemplated by 45 Ind. Admin.Code §15-5-3 are convened and the fact finder has begun to take evidence.

The recent Colorado case of People v. Litchfield, 902 P.2d 921 (Colo.Ct.App. 1995), cert. granted (Colo. Sep. 11, 1995), takes a similar approach to what I propose. Subsequent to defendants' arrests but prior to trial, the Colorado revenue department assessed defendants with controlled substances

taxes and penalties. Defendants objected to the assessment and requested an administrative hearing. At the time of trial, the department had taken no action on the objections. Defendants moved to dismiss the criminal charges on grounds that the tax assessment was punishment and the double jeopardy clauses prevented their being subjected to criminal punishment for the same conduct. Id. at 924. Although the majority today would grant such motions, the trial court in Litchfield found that jeopardy had not yet attached to the assessment because there had been "no final administrative determination of defendants' obligation to pay the tax and penalty." Id. The Colorado appellate court agreed. Assuming that the tax was punishment under Kurth Ranch, the court pointed out that:

> [T]here has been no hearing and thus no final determination of defendants' liability for the assessed tax. In addition, defendants have not paid any money to the state nor has the state taken any steps to collect the tax obligation allegedly owed.

> Accordingly, jeopardy has not yet attached and there has been no punishment by imposition of liability for the state tax. See U.S. v. Sanchez-Escareno, 950 F.2d 193 (5th Cir.1991) cert. denied, — U.S. —, 113 S.Ct. 123, 121 L.Ed.2d 78 (1992) (no jeopardy attaches to preclude the government from prosecuting defendants for drug importation offenses until defendants actually pay civil fines assessed against them or until the government sues to collect on notes executed by defendants for payment of such fines).
>
> Because defendants had not been subjected to punishment by imposition of a civil penalty for their alleged possession of marijuana, the trial court did not err when it found that the criminal prosecution did not subject them to multiple punishment in violation of the double jeopardy clauses.

Id. at 925. Note that the Colorado court finds no jeopardy attaching at least until a final determination of liability is made,[40]

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[40]In fact, the Colorado court suggests that jeopardy might not attach until the defendants actually paid money to the state or the state had taken steps to collect the tax obligation. Litchfield, 902 P.2d at 924. Cf. Ragin v. United States, 893 F.Supp. 570, 574 (W.D.N.C. 1995) (holding in forfeiture proceeding accompanying drug prosecution that "jeopardy

an even broader construction of attachment than I propose. I think attachment at the time the fact finder begins to receive evidence is a slightly better approach because it more closely tracks its criminal procedure analog.[41]

C

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attaches when the final judgment of forfeiture is entered, and not when the claim or answer is filed or the property seized.")

[41]Additional support for this approach is found in the following hypothetical offered by Judge Easterbrook in an influential administrative forfeiture case:

> Suppose the civil forfeiture gets to trial first. The United States will try to show that the money was used in an illegal drug transaction. At the beginning of the hearing, when evidence is first presented to the trier of fact in a proceeding seeking to impose a penalty for crime, jeopardy attaches.

United States v. Torres, 28 F.3d 1463, 1465 (7th Cir. 1994) (citations omitted).

The assessment of CSET raises two additional issues. First, what are the double jeopardy implications, if any, if the CSET is not contested? And, second, what are the double jeopardy implications if the revenue department, proceeding as permitted under the statute and regulation, seizes, or levies on and sells, the taxpayer's property?

C-1

In cases where the taxpayer does not contest the assessment, I would find no prosecution jeopardy as nothing analogous to prosecution has occurred.[42] However, under

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[42]See United States v. Baird, 63 F.3d 1213 (3d Cir. 1995), where defendant Baird contended that a drug prosecution subsequent to an uncontested administrative forfeiture proceeding arising from the same incident subjected him to double jeopardy, the court observed that "[w]ithout risk of a determination of guilt, jeopardy does not attach . . . . Because Baird failed to contest the forfeiture, . . . Baird was not, and could not have been, placed at risk by that process." See also United States v. Morgan, 51 F.3d 1105 (2d Cir. 1995), where

Kurth Ranch, I believe that CSET's punitive characteristics that implicate the Double Jeopardy Clause would cause punishment jeopardy to attach at the point the taxpayer began to pay the tax. Perhaps the case best illustrating this situation is United States v. Sanchez-Escareno, 950 F.2d 193 (5th Cir.1991) cert. denied, 113 S.Ct. 123 (1992), cited by the Colorado court in People v. Litchfield, supra. In Sanchez-Escareno, three individuals had been arrested and assessed large civil fines by United States Customs officials for possession and attempted importation of marijuana. Criminal indictments based on the

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defendant Morgan contended that a bank fraud prosecution subsequent to his settlement of civil proceedings brought by the United States Department of Treasury's Office of Thrift Supervision subjected him to double jeopardy, the court noted that "Morgan cannot claim prosecution for the same offense arising after an acquittal or conviction because the initial civil proceeding did not result in either."

Contra, United States v. Ursery, 59 F.3d 568, 571 (6th Cir. 1995).

same conduct followed. The defendants did not protest the civil fines but instead acknowledged them by executing promissory notes. However, the notes had not been paid nor had the government attempted to collect the notes. The district court dismissed the indictments, concluding that punishment jeopardy attached at the point the defendants executed the promissory notes. Sanchez-Escareno, 950 F.2d at 194-95.

The Fifth Circuit reversed, reasoning as follows:

> Here, the government has yet to subject the defendants to trial at all or to exact any form of punishment whatsoever. Defendants are presently in the same position as someone who has been charged in two criminal proceedings, but has not yet been tried or punished in either. If the defendants actually pay the civil fines, then any subsequent criminal prosecution would be double jeopardy. See Ex parte Lange, 18 Wall. 163, 85 U.S. 163, 21 Led. 872 (1873) (when defendant "fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone"). Likewise, if the government chooses to go forward with its prosecution of the defendants, jeopardy would attach when the jury is empaneled and sworn, as it would in any criminal case. See Serfass v. United States, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975). Finally, if the government attempts to

> collect on the notes, jeopardy would attach when the court begins to hear evidence in that action. See id. But at this point, defendants' contentions under the Double Jeopardy Clause are misplaced.

Sanchez-Escareno, 950 F.2d at 202-203.

C-2

Indiana statutes and regulations provide that if the CSET is not immediately paid, the department "may levy on and sell the person's property." Ind.Code §6-8.1-5-3 (1993); 45 Ind.Admin.Code §15-5-8. If the department exercises this option, does punishment jeopardy attach? In People v. Krizek, 271 Ill.App.3d 533, 648 N.E.2d 313 (1995), defendant appealed the trial court's denial of his motion to dismiss drug charges on grounds that the prior seizure of his home to commence civil forfeiture proceedings constituted punishment jeopardy. The Illinois court analyzed federal court decisions from Oregon and Illinois that concluded that the seizure of a defendant's property does not, by itself, constitute punishment for purposes of the double jeopardy clause:

> [A]lthough the seizure of real property under the Forfeiture Act marks the beginning of the civil forfeiture process, the actual seizure itself has limited legal significance. The act of seizure neither extinguishes the ownership rights of claimants to the property, nor does it vest title in the State. The respective ownership rights of the parties remain unaltered until such time as the trial court enters its final judgment. Until final judgment is entered, the claimant has the opportunity to retain his ownership rights in the property. Common sense dictates that it is the deprivation of ownership, not the deprivation of the unencumbered use of the property, that determines when punishment for double jeopardy purposes occurs. The State's seizure of defendant's property, therefore, does not constitute punishment for double jeopardy purposes (see [United States v.] Stanwood, 872 F.SUPP. [791,] 799 [(D.Or. 1994)]; [United States v.] Messino, 871 F.SUPP. [1027,] 1032 [(N.D.Ill. 1994)]), and the State's attempt to prosecute defendant under the Illinois Criminal Code does not contravene the double jeopardy clause.

Krizek, 271 Ill.App. at 538, 648 N.E.2d at 316. I think this reasoning is sound and would find that the seizure of a taxpayer's property by the revenue department does not constitute punishment. However, the sale of that property is a

more difficult question, one which should properly await a specific case in which the issue is argued.

C-3

Lest we become so consumed in thinking about drug taxes as punishment that we forget the general rule, it is worth recalling that the general rule is that a tax is not punishment and only becomes so when, "[t]aken as a whole," it is "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment." Kurth Ranch, 114 S.Ct. at 1948. I mention this in the context of the two preceding sections because it is altogether plausible to me that a taxpayer may pay a portion of CSET assessed, or the revenue department may levy upon and sell an amount of property, which would merely reimburse the government for its actual costs arising from the taxpayer's criminal conduct. See id. at 1945 (quoting United States v. Halper, 490 U.S. 435, 449-450 (1989)). Such a payment or levy and sale would not be sufficient in my view to constitute punishment jeopardy. Only to

the extent that the amount paid or levied upon and sold in excess of that deemed reasonably remedial should be considered to be punishment. Cf. United States v. Morgan, 51 F.3d 1105 (2d Cir. 1995), cert. denied 116 S.Ct. 171 (1995) (double jeopardy not implicated in Office of Thrift Supervision accompanying bank fraud prosecution where defendant did not make threshold showing that civil sanction was "overwhelmingly disproportionate to the government's damages and expenses"); Ragin v. United States, 893 F.SUPP. 570 (double jeopardy not implicated in civil forfeiture proceeding accompanying drug prosecution where "the forfeiture was proportional to the damages caused by Ragin's conduct, and the forfeiture was essentially remedial").

D

If the majority is right that administrative imposition of a tax which is a punishment for double jeopardy purposes can cut off the state's ability to prosecute and sentence, then I think at a minimum the notion that jeopardy attaches at the time of

assessment should be abandoned. Rather, I think analogies to the criminal procedure and the newly emerging precedents in the area of civil fines, forfeitures, and taxes indicate the following: First, a first prosecution should not attach until the accused contests the assessment and evidence is taken at an administrative hearing. At this point, the ability of the state to prosecute for the underlying criminal offense would be cut off. Second, if the accused does not contest the assessment such that no adjudicatory proceedings are commenced, there is no prosecution jeopardy and the state is free to proceed with criminal prosecution. Third, if the accused pays a portion of the assessment in a sufficient amount to constitute punishment,[43] punishment jeopardy attaches and the ability of the state to sentence for the underlying criminal offense would be cut off.

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[43]Or, arguably, such an amount of property is levied upon and sold, depriving the accused of his or her ownership thereof. See part III-C-2, supra.

Conclusion

I agree with the majority that the Indiana CSET has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause. See part I, infra. But I find nothing in Kurth Ranch that compels us to prohibit the prosecution of alleged drug offenders merely because the revenue department asserts a CSET

obligation on the part of the alleged offender first. See part II, infra.

Assuming the established principles of Double Jeopardy jurisprudence apply regardless of whether the criminal prosecution and sentencing or the imposition of CSET comes first, I would hold that (i) there is no prosecution jeopardy unless the taxpayer contests the assessment and a hearing is convened to adjudicate the protest, Litchfield, 902 P.2d at 925; prosecution jeopardy attaches when evidence is first presented to the trier of fact, Torres, 28 F.3d at 1465; and (ii) there is no punishment jeopardy unless the taxpayer pays at least a

portion of the tax, Sanchez-Escareno, 950 F.2d at 202. See part III, infra. Certainly, there is nothing in Kurth Ranch that is inconsistent with this approach. In that case, Montana's tax authorities assessed the dangerous drug tax and the taxpayers contested the assessments in administrative proceedings. Kurth Ranch, 114 S.Ct. 1942-43. Thus more happened in Kurth Ranch than the mere initiation of a drug tax assessment proceedings — the taxpayers actually contested the assessment in administrative proceedings.

Based on the foregoing analysis, I would affirm Bryant's convictions. No claim is made that Bryant contested the assessment such that an adjudication of liability was conducted. As such, no prosecution jeopardy attached and the state was free to prosecute him on the criminal charges. Nor is any claim made that Bryant voluntarily paid a sufficient amount of the tax to constitute punishment.[44] As such, no punishment

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[44]Bryant may be able to establish that the seizure of his property following assessment constituted a change in

jeopardy attached and the state was free to punish him on the criminal charges. I agree with the majority's analysis of the non-CSET issues in Bryant's appeal.

DeBRULER, Justice, concurring and dissenting.

In U.S. v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) and Montana v. Kurth Ranch, __ U.S. __, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), the complaints had already been punished as a result of a prior criminal prosecution when the governments exercised their taxing and sanctioning authority. The Supreme Court ruled in both cases that the exercise of that authority could constitute a second punishment in violation of double jeopardy. Here, by contrast, the state exercised its taxing and sanctioning authority before appellant Bryant was placed in jeopardy in court. The manner in which that taxing and sanctioning

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ownership such that he could argue punishment. That issue, left open in part III-C-2, supra, is not before us.

authority was exercised by Indiana revenue agents was normal for processes followed where controlled and regulated substances are involved. In my view, case law does not command the conclusion that those processes constituted a first punishment under the Double Jeopardy Clause. I would therefore affirm all of appellant's convictions.

To be sure, the legal signposts do not all point in the same direction. The large amount of the controlled substance excise tax and the fact that the tax is upon an illegal activity do tend to support the conclusion that it is a first jeopardy punishment under the Double Jeopardy Clause. However, those factors are lessened in value since the tax promotes the legitimate tax purposes of deterring a socially undesirable activity and raising revenue from what we know can be a highly profitable, clandestine, commercial enterprise. While the tax looks radically high as applied to marijuana, it looks less radical when applied to other

controlled substances such as LSD and the opium derivatives, which are lighter in weight and more expensive on the black market.

In prosecutions of unlawful possession of other highly regulated substances such as liquor and cigarettes, it is ordinary for the criminal prosecution for possession of untaxed liquor or cigarettes to be viewed only as a first jeopardy even though the tax with penalty was paid during the pendency of the criminal proceeding. See Ind.Code Ann. §7.1-5-4-1 (West 1982); Ind.Code Ann. §6-7-1-24 (West 1989). Such payment is a wise choice since it might persuade a prosecutor not to pursue a conviction, or might serve as a mitigator in the judicial determination of a proper sentence. Such payment is not regarded as a first jeopardy punishment.

Finally, an assessment issued from within the revenue department operates under the majority opinion to foreclose exercise of the police power expressed in the tax statute via

the local prosecuting attorney. That power is of the highest essential order, and I am reluctant to embrace such a shift of it, except in the clearest of circumstances.

IN THE

SUPREME COURT OF INDIANA

KEVIN AND MONICA CLIFFT,	)
	)
Appellants,	)
	)
v.	)
	)
INDIANA DEPARTMENT OF STATE REVENUE and KENNETH L. MILLER, COMMISSIONER,	)
	)
Appellees.	)

Cause No. 49S10-9503-TA-331

APPEAL FROM THE INDIANA TAX CCURT
The Honorable Thomas G. Fisher, Judge

December 27, 1995

SHEPARD, Chief Justice.

A woman and her husband were arrested for criminal drug possession. After their arrest, the State assessed the Indiana Controlled Substance Excise Tax (CSET) against them and the wife pled guilty to misdemeanor drug possession. The

couple now contends the tax was a second jeopardy in violation of the Double Jeopardy Clause.

I. Statement of Facts

In October 1992, police executed a search warrant for the home of appellants Monica and Kevin Clifft. During their search, police discovered 927 grams of marijuana.

The police contacted appellee Indiana Department of State Revenue and reported their findings. The Department subsequently assessed the CSET against the Cliffts. Based on the weight of the drug multiplied by the statutorily prescribed rate of $40 per gram, the Department found the Cliffts owed $37,080 in drug taxes. Ind. Code Ann. § 6-7-3-6 (West Supp. 1994). It also assessed a 100 percent penalty against the couple for their failure to pay the tax when first possessing the drugs. Ind. Code Ann. § 6-7-3-11 (West Supp. 1994). When these sums were combined with administrative charges, the Cliffts' total tax liability was $77,871. Interest immediately began to accrue at the rate of $8.13 per day.

In January 1993, Monica pled guilty to possession of marijuana, a class A misdemeanor. The court ordered her driver's license suspended for six months and directed imprisonment of 365 days, with 363 suspended. The State dropped its charges against Kevin.

The Cliffts subsequently appealed the Department's CSET assessment to the Indiana Tax Court. The couple claimed the CSET violated their double jeopardy, due process and equal protection rights, as well as their privilege against self-incrimination. After a hearing on the merits, the court concluded that the CSET assessment was Monica's second jeopardy, but found Kevin had not twice been placed in jeopardy. It therefore reversed the assessment against Monica. The court further determined that the CSET did not violate the couple's due process, equal protection and self-incrimination rights. Clifft v. Indiana Dep't of State Revenue (1994), Ind.Tax, 641 N.E.2d 682.

The Cliffts' petitioned this Court for review of their due process and self-incrimination claims. The Department petitioned for review of the double jeopardy issue. We held oral argument and granted review as to all three issues. Consequently, we now consider:

1. Whether the imposition of the CSET was a second jeopardy in violation of the Cliffts' double jeopardy rights afforded by the Fifth Amendment of the United States Constitution;

2. Whether the CSET violates the privilege against self-incrimination embodied in the Fifth Amendment to the U.S. Constitution; and,

3. Whether the CSET violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

We hold that the CSET was Monica and Kevin's first jeopardy. Monica's criminal conviction for possession was therefore her second jeopardy, and it was barred by the Double

Jeopardy Clause. No second jeopardy occurred in Kevin's case; therefore, his double jeopardy rights were not violated. We further conclude that the CSET violates neither the Cliffts' privilege against self-incrimination nor their due process rights.

II. Standard of Review

Decisions of the Indiana Tax Court are entitled to a presumption of validity on appellate review. USAir, Inc. v. Indiana Dep't of State Revenue (1991), Ind., 582 N.E.2d 777; Ind.Tax Court Rule 10. We affirm the Tax Court's decision unless, after reviewing the record as a whole, this Court "is left with the definite and firm conviction that a mistake was made, even though there was some evidence to support the finding below." USAir, 582 N.E.2d at 778. In such a case, the findings of the Tax Court are clearly erroneous and are thus reversible. Indiana Dep't of State Rev. v. Bethlehem Steel Corp. (1994), 639 N.E.2d 264.

III. Double Jeopardy

Like the appellant in today's case of Bryant v. State (1995), Ind., ____ N.E.2d ____, the Cliffts argue that the CSET assessment was their second jeopardy in violation of the Double Jeopardy Clause. U.S. CONST. amend. V. Our holding from Bryant thus applies: the CSET is a punishment and thus a jeopardy for double jeopardy purposes which attaches at the moment of assessment.

Because the State assessed the CSET and its 100 percent penalty against Monica and then convicted her in a separate proceeding under the criminal law for the same drug offense, she was twice placed in jeopardy. Accordingly, the second jeopardy, Monica's criminal conviction, is contrary to the Double Jeopardy Clause. Her CSET liability does not violate the Double Jeopardy Clause.

Kevin did not suffer multiple jeopardies for the same offense. The State assessed the CSET against him, but did not follow that assessment with any criminal action. He therefore cannot be said to have twice been placed in jeopardy.

IV. Self-Incrimination

The Cliffts claim the CSET violates a taxpayer's privilege against self-incrimination awarded by the Fifth Amendment to the U.S. Constitution.[45] The couple argues that by virtue of the fact that a taxpayer must present herself in the Department's office when paying the CSET, she is forced to incriminate herself. We disagree.

The Fifth Amendment provides that no person shall be compelled to be a witness against himself. U.S. CONST. amend. V. This privilege is applicable to the states through the Fourteenth Amendment Due Process Clause and is afforded "'in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.'" Maness v. Meyers, 419 U.S. 449, 464 (1975) (quoting Kastigar v. United States, 406 U.S.

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[45]Before the Tax Court, the Cliffts also claimed that the CSET violated their privilege against self-incrimination under the Indiana Constitution. IND. CONST., art. I, § 14. They do not raise this issue in their Petition for Review.

441, 444 (1972)). As a result of this privilege, our jurisprudential system follows the maxim *nemo tentur prodere*: No person is bound to accuse himself. Ann. L. Iijima, The War on Drugs: The Privilege Against Self-Incrimination Falls Victim to State Taxation of Controlled Substances, 29 Harv. C.R.-C.L. L. Rev. 101, 103 (1994). This maxim unquestionably underlies the foundation of our accusatorial judicial system, which requires the state to pursue its prosecution by questioning witnesses other than the defendant and dictates that the defendant is not required to assist the prosecution in its case against her. Id.

Taxes like Indiana's CSET are not altogether novel and, accordingly, neither are challenges to them under a self-incrimination theory.[46] Defendants using the Fifth Amendment

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[46]Numerous states have enacted CSET-like taxes. ALA CODE §§ 40-17A-1 to -16 (Michie Supp. 1994) ("Drugs and Controlled Substances Excise Tax"); ARIZ. REV. STAT. ANN. §§ 42-1201 to -18 (West 1994) ("Luxury Privilege Tax"); COLO.

REV. STAT. ANN. §§ 39-28.7-101 to -9 (Bradford Supp. 1994) ("Controlled Substances Tax"); FLA. STAT. ANN. § 212.0505 (West Supp. 1995); GA. CODE ANN. §§ 48-15-1 to -11 (Harrison Supp. 1994); IDAHO CODE §§ 63-4201 to -11 (Michie Supp. 1994) ("Illegal Drug Stamp Tax Act"); ILL. ANN. STAT. ch. 35 ILCS 520/1 to -26 (Smith-Hurd 1995) ("Cannabis and Controlled Substances Tax Act"); KAN. STAT. ANN. §§ 79-5201 to -12 (1994) ("Marijuana and Controlled Substances Tax"); ME. REV. STAT. ANN. tit. 36 §§ 4433 to -6 (West 1994) ("Illegal Drug Tax"; imposed only after a conviction for illegal possession); MINN. STAT. ANN. §§ 297D.01 to .14 (West 1995) ("Marijuana and Controlled Substance Taxation"); MONT. CODE ANN. §§ 15-25-101 -23 (1993) ("Dangerous Drug Tax"); NEB. REV. STAT. §§ 77-4301 to -16 (1993) ("Marijuana and Controlled Substances Tax"); OKLA. STAT. ANN. tit. 68 §§ 450.1 to .9 (West Supp. 1994) ("Controlled Dangerous Substance Tax"); R.I. GEN. LAWS §§ 44-49-1 to -15 (Michie Supp. 1994) ("Taxation of Marijuana and Other Controlled Substances"); TEX. TAX CODE ANN. §§ 159.001 to .301 (West Supp. 1995) ("Controlled Substances Tax"); UTAH CODE ANN. §§ 59-19-101 to -7 (Michie Supp. 1994) ("Illegal Drug Stamp Tax Act"); WIS. STAT. ANN. §§ 139.87 to .96 (West Supp. 1994) ("Tax on

privilege against self-incrimination have challenged CSET-style taxes in Minnesota,[47] Florida,[48] South Dakota,[49] Kansas,[50] Utah[51] and elsewhere. These courts rightly evaluate their drug taxes under the self-incrimination analysis developed by the U.S. Supreme Court in the Marchetti/Grosso series of cases. This analysis requires courts to consider:

(1) Whether the activity being taxed is in an area "permeated with criminal statutes" and whether the tax is aimed at individuals who are "inherently suspect of criminal activities";

Controlled Substances"); WYO. STAT. § 39-6-405(a)(xix) (1994) ("Sales Tax").

[47]Sisson v. Tripplett, 428 N.W.2d 565 (Minn. 1988).

[48]Florida Dept of Revenue v. Herre, 634 So.2d 618 (Fla. 1994).

[49]State v. Roberts, 384 N.W.2d 688 (S.D. 1986).

[50]State v. Durrant, 769 P.2d 1174 (Kan. 1989), cert. denied, 492 U.S. 923.

[51]State v. Davis, 787 P.2d 517 (Utah App. 1990).

(2) Whether the procedure requires the individual to give information which would reasonably be expected to be available to police; and,

(3) Whether the data provided by the individual would constitute a significant link in the chain of evidence helping to establish guilt.

See Marchetti v. United States, 390 U.S. 39, 47-48 (1968) (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965)); Leary v. United States, 395 U.S. 6 (1969) (conviction for failure to pay tax under Marijuana Tax Act violates privilege); Grosso v. United States, 390 U.S. 62 (1968) (conviction for failure to pay wagering excise tax violated privilege).

There are two final considerations which this Court must consider when applying the Marchetti test. First, the privilege may only be invoked when the threat of incriminating oneself is "real and appreciable" and not merely "imaginary and unsubstantial." Marchetti, 390 U.S. at 48. Second, where

available statutory protection is broad enough to encompass the same protection afforded by the Fifth Amendment, an individual cannot successfully assert the Amendment's privilege. Id. at 58 (citing Counselman v. Hitchcock, 142 U.S. 547, 585 (1892)("[L]egislation cannot abridge a constitutional privilege... unless it is so broad as to have the same extent and scope and effect.")).[52]

Through applying the Marchetti test to various taxes on illegal activities, the U.S. Supreme Court has voided CSET-

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[52]The issue examined today was long ago noticed by this Court when it decided Wilkins v. Malone (1860), 14 Ind. 153, an opinion relied upon by the U.S. Supreme Court in resolving Counselman. In Wilkins, we said: "Literally, this provision extends to criminal prosecutions only, and not to civil actions; but we think its spirit and intent go much farther, and protect a person from a compulsory disclosure, in a civil suit, of facts tending to criminate the party, wherever his answer could be given in evidence against him in a subsequent criminal prosecution."

style assessments on wagering, illegal firearms, and controlled substances on the grounds that they violate a taxpayer's privilege against self-incrimination. Grosso, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Leary, 395 U.S. 6. In each of these cases, the Supreme Court found the Marchetti test was satisfied because a real and substantial risk of self-incrimination existed. Information required to be disclosed in Grosso, Haynes, and Leary included various combinations of a taxpayer's name, home and business addresses, social security number, admissions that the taxpayer is conducting an illegal activity, names and addresses of patrons, an income return disclosing the illegal activity, and a record of the taxpayer's felony convictions. The Supreme Court found these statutes compelled self-incrimination because they required the disclosure of identifying and incriminating information that was then made available to law enforcement authorities. Grosso, 390 U.S. at 65-66; Haynes, 390 U.S. at 96; Leary, 395 U.S. at 14-15.

State courts applying the identical rationale to drug tax cases have reached an identical conclusion. See, e.g., Briney v. State Dep't. of Revenue, 594 So.2d 120 (Ala Civ. App. 1991). Application of the Marchetti test to the CSET therefore directs our focus to the disclosure of information compelled at the time of payment and whether that information is, or could be, distributed to police.

The CSET easily meets the first prong of Marchetti because it is imposed in an area permeated with criminal statutes and is aimed at individuals who are inherently suspected of illegally possessing, manufacturing and distributing controlled substances. The question thus becomes whether the information disclosed when a taxpayer pays the CSET is turned over to police and whether that information constitutes a "significant link" in the chain of evidence to establish guilt.

The second prong of the Marchetti test is satisfied by the CSET because information disclosed by a taxpayer is not and

cannot be revealed to law enforcement authorities for any purpose other than tax collection. Ind. Code Ann. § 6-8.1-7-1 (West Supp. 1994). Section 6-8.1-7-1 prohibits the Department and its agents from divulging the amount of tax paid, any investigative reports or records or any other information disclosed by the reports filed under the provisions of law relating to the CSET when it is agreed that the information is to be confidential and to be used solely for official purposes. Id. Any such divulgence is a class C misdemeanor and grounds for immediate dismissal. Ind. Code Ann. § 6-8.1-7-3 (West Supp. 1994).

The Cliffts allege that § 6-8.1-7-1 does not apply to the CSET and that, even if it did, information disclosed by the CSET payor cannot fall within its confidentiality requirement because the CSET does not "generate information which could be disclosed on reports or obtained from federal returns . . . ." Memorandum in Support of Summary Judgment, p.10. We cannot agree. Because the legislature included the CSET as a

listed tax within § 6-8.1-1-1, information disclosed when paying the CSET is subject to § 6-8.1-7-1's confidentiality provision. Moreover, § 6-8.1-7-1's sweeping language prohibiting disclosure of "any other information" inherently includes any information a CSET payor discloses to the Department. As such, information disclosed when paying the CSET is strictly confidential.

Ultimately, it is evident that the legislature recognized the CSET's potential self-incrimination violations and sought to avoid them by requiring that the data collected by the Department be kept confidential. The legislature went out of its way to ensure this confidentiality by ordering a punishment for disclosure, Ind. Code § 6-8.1-7-3, and by simultaneously removing any incentive to disclose the information by providing that it cannot be used to "initiate or facilitate" the taxpayer's prosecution, Ind. Code Ann. § 6-7-3-9. We believe the privilege against self-incrimination requires no more.

The larger issue is therefore whether information required to be disclosed when paying the CSET could constitute a significant "link in a chain of evidence" to establish the taxpayer's guilt. Marchetti, 390 U.S. at 48. The Cliffts claim that the statute requires taxpayers to present themselves physically before Department authorities when paying the CSET. They contend this presence is, in and of itself, compelled self-incrimination. We cannot agree.

We determine what must be disclosed when paying the CSET by looking at the statute's plain language. Our objective is to determine and effect legislative intent. Spaulding v. International Bakers Serv. (1990), Ind., 550 N.E.2d 307. We ascertain and implement legislative intent by "'giving effect to the ordinary and plain meaning of the language used in the statute.'" Helton v. State (1993), Ind.App., 624 N.E.2d 499. The statute is examined and interpreted as a whole and the language itself is scrutinized, including the grammatical structure of the clause or sentence at issue. Foremost Life Ins.

Co. v. Department of Ins. (1980), 274 Ind. 181, 409 N.E.2d 1092. Within this analysis, we give words their common and ordinary meaning, without "'overemphasizing a strict literal or selective reading of individual words.'" Spaulding, at 307 (quoting Foremost, 274 Ind. at 186, 409 N.E.2d at 1096).

The language of the CSET reveals the fallaciousness of the Cliffts' claim that the statute compels self-incrimination by requiring a taxpayer's presence before Department employees. On the contrary, the statute does not require a taxpayer's presence because the CSET may be paid by an agent of the taxpayer. The CSET's grant of this authority occurs in § 6-7-3-8 which provides that the tax is due when, "the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of IC 35-48-4 or 21 U.S.C. 841 through 852," but also explains that, "[a] person may not be required to reveal the person's identity at the time the tax is paid." Ind. Code Ann. § 6-7-3-8 (emphasis added). As the Tax Court correctly explained, this language does not state who is

required to tender the tax due but, rather, states when the tax is due. Moreover, "the juxtaposition of an indefinite article ("a") to modify who 'may not be required to reveal,' and a definite article ("the") to modify whose 'identity' may not be revealed," necessary includes the possibility that anyone can pay the tax. Clifft, 641 N.E.2d at 687 (quoting Ind. Code § 6-7-3-8). A drug possessor may, accordingly, empower another to pay the tax on his behalf and thereby disclose nothing to Department authorities.

It is also "just as important to recognize what the statute does not say as it is to recognize what it does say" when evaluating whether the information required to be disclosed under the CSET constitutes a "significant link." Irmscher v. McCue (1987), Ind.App., 504 N.E.2d 1034, 1037 (citing Charles W. Smith & Sons, INc. v. Lichtefeld-Masaaro (1985), Ind.App., 477 N.E.2d 308, 310)(emphasis added). The CSET does not require the payor to disclose the identity of the person in possession of drugs, nor does it require the disclosure of the

address or telephone number of the possessor. Ind. Code Ann. § 6-7-3-8 (West Supp. 1994). Furthermore, it does not require the payor to reveal his driver's license or other identification, social security number, details of the possession, manufacture or sale of drugs, location of the controlled substances or any other incriminating information. The only data the taxpayer must reveal is the particular amounts of specific drugs listed within the statute which he or his agent possesses. This is required because it is the means by which the CSET may be calculated. Ind. Code § 6-7-3-6. Aside from this divulgence, however, the taxpayer is required to do no more than pay the CSET by some means. This is markedly different from the strict disclosure requirements found in Marchetti, Grosso, Haynes and Leary.

Because the CSET satisfies the three prongs of the Marchetti test, there is no "real and appreciable" risk of self-incrimination in violation of the Fifth Amendment. If such a risk did exist, Marchetti would require this Court to evaluate whether

some other protection existed which was broad enough to encompass the Fifth Amendment protection. Marchetti, 390 U.S. at 58. We conclude, as did the Tax Court, that the CSET provides this equivalent protection by affording taxpayers both use and derivative use immunity. Ind. Code Ann. § 6-7-3-9. Because our conclusion is identical to that of the Tax Court, we summarily affirm its opinion on the immunity issue. Ind.Appellate Rules 11(B)(3) & 18(H)(2).

IV. Due Process

The Cliffts next argue that the CSET does not provide the procedural due process demanded by the Fourteenth Amendment to the U.S. Constitution. They claim the CSET unconstitutionally allows the Department to seize property before providing notice or an opportunity for a hearing.[53]

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[53]The Department assessed the CSET against the Cliffts on November 9, 1992. The couple protested this assessment and received an administrative hearing on March 5, 1993. As a result of this proceeding, the Department affirmed the

The Department's CSET assessment is a "jeopardy assessment." Ind. Code Ann. § 6-7-3-13 (West Supp. 1994). Consequently, the Department may immediately utilize collection efforts normally available only after providing notice and an opportunity for the taxpayer to be heard. Id. (cross-referencing Ind. Code Ann. § 6-8.1-5-3 (West Supp. 1994)). The Department may, for example, demand payment of the CSET and, where payment is not instantly rendered, may immediately levy on and seize the taxpayer's property. It may then sell the property to satisfy the CSET liability, even where an appeal is pending. Ind. Code § 6-8.1-5-3.

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assessment in its May 12 findings and the Cliffts appealed to the Tax Court. The Tax Court found no evidence that the Department had ever attempted to collect the CSET owed by the Cliffts. As such, the Cliffts "received an administrative hearing and judicial review prior to suffering any deprivation of their property . . . " Clifft, 641 N.E.2d at 691. This lack of collection is not, however, determinative of their due process claim.

On the other hand, the CSET does provide due process opportunities after the Department has issued an assessment. Once assessment occurs, a taxpayer may protest his CSET liability to the Department. It, in turn, conducts an administrative hearing within which the taxpayer may present evidence and make his case. Ind. Code Ann. § 6-8.1-5-1 (West Supp. 1994). Some time after the hearing, the Department issues its findings, upon which a dissatisfied taxpayer may base his appeal to the Tax Court. Because the Department has the authority to begin its collection efforts immediately after assessment, however, these administrative and judicial hearings normally occur after the taxpayer has been deprived of his property.

The taxpayer also possesses a simultaneous opportunity to seek the equitable remedy of injunctive relief. Ind. Code Ann. § 33-3-5-11 (West Supp. 1994). Through this remedy, the taxpayer may enjoin the Department from its collection of her property pending her original tax appeal. See,

e.g., Keller v. Indiana Dep't. of State Revenue (1988), Ind. Tax, 530 N.E.2d 787.

The question of whether the CSET affords a taxpayer procedural due process depends directly on the scope of the Due Process Clause. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). This requirement is imposed in judicial, governmental and agency actions. Withrow v. Larkin, 421 U.S. 35 (1975). Accordingly, the Due Process Clause ensures that, in different situations entailing different procedures, individuals are guaranteed government proceedings which are fair and impartial. Id.

Traditional notions of due process enunciated by the U.S. Supreme Court required notice and a hearing before a creditor's seizure of disputed property. Fuentes v. Shevin, 407 U.S. 67 (1972). Today, however, courts frequently conclude

that liberty and property interests are adequately protected by procedures imposed after the government deprivation acts against the property. See, e.g., Commissioner v. Shapiro, 424 U.S. 614 (1976) (levy on assets to secure payment of jeopardy assessment permitted when taxpayer given prompt hearing for injunctive relief against levy); Sisson v. Triplett, 428 N.W.2d 565 (Minn. 1988). This shift is presumably due to the Supreme Court's conclusion that due process is not "a technical conception with a fixed content unrelated to time, place and circumstances," but rather is a principle which should be flexibly applied, depending on the particular situation. Mathews, 424 U.S. 334. As such, where property rights are involved, mere postponement of the opportunity to be heard is not a denial of due process if the opportunity ultimately given is adequate. Shapiro, 424 U.S. 614, 631-32 (citing Phillips v. Commissioner, 283 U.S. 589, 595, 596-97).

By including the CSET in the category of assessments which the Department may immediately collect, the legislature

has classified this area as one in which the magnitude of the government's need to take action without administrative delay justifies the temporary deprivation of property which may occur. We agree with this conclusion and the Cliffts have presented no evidence upon which we may base a contrary assertion. Moreover, the CSET does not deny, but merely postpones, due process opportunities by providing a full and fair opportunity to be heard post-deprivation, when the taxpayer protests his assessment. The Department's subsequent hearing on the protest is the taxpayer's opportunity to challenge the validity of the tax and to have property wrongly taken returned or to be refunded its value if it has been sold. The taxpayer receives a further opportunity to be heard when she seeks judicial review of the assessment through an original appeal to the Tax Court. All the while, from the moment of assessment to final appeal, the taxpayer also possesses the right to block collection efforts by seeking injunctive relief.

We conclude that these procedures afford review in a meaningful time and in a meaningful manner which comports with the Fourteenth Amendment. The Cliffts' due process rights were not violated.

IV. Conclusion

We therefore affirm the decision of the Tax Court in all respects except its conclusion that Monica's CSET liability was barred as a second jeopardy. We reverse as to this issue and reinstate the civil penalties assessed against her.

Dickson and Selby, JJ., concur.

DeBruler, J., concurs in result and dissents with separate opinion to follow.

Sullivan, J., concurs and dissents with separate opinion.

SULLIVAN, Justice, concurring and dissenting.

As explained in part II of my dissent today in State v. Bryant (1995), Ind., ____ N.E.2d ____ (Sullivan, J., dissenting),

I believe the majority errs in holding that an administrative assessment of a tax can constitute a first punishment for double jeopardy purposes.[54] As such, I believe that Monica Clifft's criminal conviction is not contrary to the Double Jeopardy Clause. However, payment of the CSET assessed would constitute a second punishment of Monica Clifft and would therefore be barred by Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994) (tax on the possession of illegal drugs assessed after the state has imposed a criminal penalty for the same conduct violated Double Jeopardy Clause).

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[54]If we were to proceed under the alternative approach I describe in part III of my Bryant dissent, I would remand to the Tax Court for determination of when jeopardy attached, i.e., when evidence was first presented to a trier of fact in the Cliffts' contest of the assessment. If that occurred prior to jeopardy attaching in Monica Clifft's criminal prosecution, then the result would be the same as the majority reaches here.

I agree with the majority that no second jeopardy occurred in Kevin Clifft's case and that the CSET violates neither the Cliffts' privilege against self-incrimination nor their due process rights.

DeBRULER, J., concurring in result and dissenting with opinion.

I concur in sections II, IV, and V. I cannot agree with section III, which states the court's holding that the jeopardy assessment for tax and penalty which preceded Monica Clifft's guilty plea to illegal possession of marijuana constituted a first punishment jeopardy under the Double Jeopardy Clause and that her conviction upon a plea of guilty violated the Double Jeopardy Clause. See Bryant v. State (1995), Ind., 660 N.E.2d 290 (DeBruler, J., concurring and dissenting). As I understand the record, the Cliffts have to date been subject to no collection efforts and have paid none of the tax. In light of the conclusion of this appeal, this

case will now continue in the Tax Court for consideration of the other constitutional claims made by the Cliffts. I concur in that result.

IN THE

INDIANA TAX COURT

KEITH AND MARY HALL,)
)
Petitioners,)
)
v.)
)
INDIANA DEPARTMENT OF STATE REVENUE)
and KENNETH L. MILLER, COMMISSIONER,)
)
Respondents.)

Case No. 49T10-9306-TA-00036
October 11, 1994
APPEAL FROM A FINAL DETERMINATION OF THE
INDIANA DEPARTMENT OF STATE REVENUE

FISHER, J.

The petitioners, Keith and Mary Hall (the Halls), appeal the final determination of the respondent, the Indiana Department of State Revenue (the Department), assessing controlled substance excise tax (CSET) against the Halls. Like the petitioners in the other three decisions the court

hands down today, Clifft v. Indiana Department of State Revenue (filed Oct. 11, 1994), Ind.Tax No. 49T10-9308-TA-00064, Bailey v. Indiana Department of State Revenue (filed Oct. 11, 1994), Ind.Tax No. 49T10-9302-TA-00009, and Hayse v. Indiana Department of Sate Revenue (filed Oct. 11, 1994), Ind.Tax No. 49T10-9308-TA-00063, the Halls challenge the constitutionality of the CSET.

On February 12, 1993, police entered the Halls' Indianapolis residence. In a locked basement storage room, they discovered a bale of marijuana weighing roughly 300 pounds or 142,238 grams. Both Mr. and Mrs. Hall were arrested, and Mr. Hall was later convicted of Class D felony marijuana possession. All charges against Mrs. Hall were dropped.

On February 16, the Department presented the Halls with a CSET assessment of $5,691,320.00, representing a tax of $40 per gram on the 142,283 grams assessed. Because the Halls had not paid the CSET when it was due,

the Department also assessed a 100 percent penalty of $5,691,320.00, for a total assessment of $11,382,640. Interest began accruing immediately at a daily rate of $1,091.49.

Acting pursuant to the tax warrant the Department issued with its jeopardy assessment,[55] the Marion County Sheriff began levying on the Halls' property. Ultimately, the Sheriff seized property and garnished wages worth roughly $40,000, enough to pay five to six weeks' worth of interest charges. The Sheriff ceased collection efforts several months ago.

The Halls are represented by the same counsel as the Cliffts, and procedurally, this appeal is on a par with the Cliffts': it is before the court on the parties' cross motions for summary judgment. Because the motions raise the same questions as the motions in Clifft, the court reiterates its holding that the CSET does not violate the Fifth Amendment

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[55] See IND. CODE 6-7-3-13; 6-8.1-5-3.

privilege against self-incrimination or the Fourteenth Amendment rights to equal protection and procedural due process. Clifft, slip op. at 15, 19, 21.

The court also reiterates its holding that the CSET is a punishment within the meaning of the Fifth Amendment prohibition against double jeopardy under Department of Revenue v. Kurth Ranch (1994), ____ U.S. ____, ___, 114 S.Ct. 1937, 128 L.Ed.2d 767. Clifft, slip op. at 25-26. Because Mrs. Hall has suffered no criminal prosecution or punishment, the assessment against her is therefore unaffected by this opinion.[36] Mr. Hall, on the other hand, has already been convicted on felony possession charges. Like the petitioners in Bailey and Hayse, and one of the petitioners in Clifft, Mr. Hall was arrested, assessed with CSET liability, and convicted with all or almost all of his

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[36] Mrs. Hall retains for trial, however, her challenge to possession of the marijuana, as well as her claims under the Fourth and Eighth Amendments, and 42 U.S.C. § 1983.

CSET liability outstanding. He has been punished once, and the Department cannot punish him again by collecting the CSET from him. See Clifft, slip op. at 25-26.

Accordingly, the court GRANTS the Department's motion for partial summary judgment in part and GRANTS the Halls' motion for partial summary judgment in part. The final determination of the Department assessing the CSET against Mr. Hall is REVERSED. The disposition of the final determination assessing the CSET against Mrs. Hall will await trial.

IN THE

INDIANA TAX COURT

KEVIN AND MONICA CLIFFT,

Petitioners,

v.

INDIANA DEPARTMENT OF STATE REVENUE

and KENNETH L. MILLER, COMMISSIONER,

Respondents.

Cause No.: 49T10-9308-TA-00064
October 11, 1994
APPEAL FROM A FINAL DETERMINATION OF

THEINDIANA DEPARTMENT OF STATE REVENUE

FISHER, J.

Indiana levies a tax on the delivery, possession, and manufacture of controlled substances (the controlled substance excise tax or CSET).[57] The present appeal,

[57] IND. CODE 6-7-3-5.

before the court on the parties' cross motions for partial summary judgment, challenges the constitutionality of the CSET. Specifically, the petitioners, Kevin and Monica Clifft, raise the following issues:

I. Whether the CSET violates the privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

II. Whether the CSET violates the Cliffts' equal protection rights under the Fourteenth Amendment to the United States Constitution.

III. Whether the CSET violates the Cliffts' due process rights under the Fourteenth Amendment to the United States Constitution.

IV. Whether the CSET violates the double jeopardy clause of the Fifth Amendment to the United States Constitution.[58]

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[58] In their motion for summary judgment, the Cliffts also claim the CSET violates their corresponding rights under Article I, §§ 14 and 23 of the Indiana Constitution.

A movant for summary judgment under Ind. Trial Rule 56(C) bears the burden to prove both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. C & C Oil Co. v. Indiana Dep't of State Revenue (1991), Ind. Tax, 570 N.E.2d 1376, 1378. Regardless of the existence or absence of a genuine issue of material fact on their state constitutional claims, the Cliffts have not attempted to show they are entitled to judgment as a matter of law. Indeed, they have made no argument to support their bare allegations, and therefore are not entitled to summary judgment. Consequently, the court will not consider the Cliffts' state constitutional claims further within the context of the present motions.

BACKGROUND

AND

PROCEDURAL POSTURE

The CSET, which went into effect on July 1, 1992,is imposed on controlled substances that are:

(1) delivered;

(2) possessed; or

(3) manufactured;

in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 852. The tax does not apply to a controlled substance that is distributed, manufactured, or dispensed by a person registered under IC 35-48-3.

I.C. 6-7-3-5. Thus, a person becomes liable for the CSET "when the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of IC 35-48-4 or 21 U.S.C. 841 through 852." IND. CODE 6-7-3-8. Failure to pay the tax when due gives rise "to a penalty of one hundred percent (100%) of the tax in addition to the tax." IND. CODE 6-7-3-11(a).

The amount of tax is based upon the weight and class of the substance. IND. CODE 6-7-3-6. Schedule I, II, and III substances are taxed at $40 per gram, while Schedule IV and V substances are taxed at $20 per gram and $10 per gram, respectively. Id. THC, the active ingredient in marijuana, is a schedule I substance. IND. CODE 35-48-2-4(d)(22).

On October 8, 1992, Indianapolis and Speedway police executed a search warrant for the Cliffts' home. In their search, the police discovered and confiscated six marijuana plants, baggies containing marijuana, and

marijuana growing equipment. The Marion County Forensic Crime Laboratory weighed the marijuana, finding a total of 927 grams.

After law enforcement authorities shared their information with the Indiana Department of State Revenue (the Department), the Department assessed the Cliffts with CSET liability of $37,080, a 100% nonpayment penalty of $37,080, a 10 percent collection fee of $3,708,[59] and a clerk's charge of $3.00, for a total of $77,871.00. Interest began accruing immediately at the rate of $8.13 per day.

On January 14, 1993, the Marion Municipal Court accepted a plea agreement between Mrs. Clifft and the Marion County Prosecutor. Mrs. Clifft pled guilty to possession as a Class A misdemeanor and received a six month driver's license suspension plus 365 days of incarceration, with 363 days suspended. The charges against Mr. Clifft were dropped. At the time of the hearing

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[59] IND. CODE 6-8.1-8-2(b).

before this court in November 1993, the Cliffts had made no payments toward their CSET liability.

DISCUSSION AND DECISION

Because this is an appeal from a final determination of the Department, the court hears the case de novo and is bound by neither the issues nor the evidence presented during the administrative proceedings. Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue (1994), Ind. Tax, 633 N.E.2d 359, 362 (citing Maurer v. Indiana Dep't of State Revenue (1993), Ind. Tax, 607 N.E.2d 985, 986). In reviewing the parties' cross motions for partial summary judgment, the court is not to enter summary judgment unless there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Id. (citing Harlan Sprague Dawley v. Indiana Dep't of Revenue (1992), Ind. Tax, 605 N.E.2d 1222, 1225).

Because the Cliffts challenge the constitutionality of the CSET, they face a difficult burden. They must rebut the

strong presumption that statutes are constitutional. See State Line Elevator, Inc. v. State Bd. of Tax Comm'rs (1988), Ind. Tax, 528 N.E.2d 501, 503.

I

SELF-INCRIMINATION

The Cliffts first claim the CSET violates the privilege against self-incrimination under the Fifth Amendment to the United States Constitution. They maintain that the simple act of paying the CSET subjects taxpayers to "real and substantial" risks of incrimination. Counsel's argument is well made, but it cannot prevail.

A. Case Law

It is well settled that, standing alone, the illegality of an activity, such as the unauthorized possession of marijuana or other controlled substances, does not preclude taxation of the activity. Department of Revenue v. Kurth Ranch (1994), ____ U.S. ____, ___, 114 S.Ct. 1937, 1945, 128 L.Ed.2d 767, 778 (and cases cited therein). Instead,

when a state or the federal government seeks to tax illegal activity, the inquiry focuses on whether the relevant imposition and collection methods are consistent with the privilege. See Marchetti v. United States (1968), 390 U.S. 39, 44, 88 S.Ct. 697, 700, 19 L.Ed.2d 889, 895.[60] See also Leary v. United States (1969), 395 U.S. 6, 12, 89 S.Ct. 1532, 1535, 23 L.Ed.2d 57, 68; Haynes v. United States (1968), 390 U.S. 85, 90, 88 S.Ct. 722, 726, 19 L.Ed.2d 923, 928; Grosso v. United States (1968), 390 U.S. 62, 65, 88 S.Ct. 709, 712, 19 L.Ed.2d 906, 910-11. To violate the privilege under Marchetti and its progeny, the taxing obligations must

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[60] That the statutes at issue in this appeal are taxing statutes is irrelevant to the availability of the privilege. The privilege "can be asserted 'in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.'" Maness v. Meyers (1975), 419 U.S. 449, 464, 95 S.Ct. 584, 594, 42 L.Ed.2d 574, 587 (quoting Kastigar v. United States (1972), 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212).

create "'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." Marchetti at 48, 88 S.Ct. at 702, 19 L.Ed.2d at 898 (citing Regina v. Boyes, 1 B&S 311, 330).

Each of the cited cases involved the taxation of illegal activity: gambling in Marchetti and Grosso; possession of sawed off shotguns in Haynes; possession of marijuana in Leary. In all of them, the United States Supreme Court held the tax imposition and collection methods subjected the individuals involved to "real and appreciable" hazards of self-incrimination.

In Marchetti, the Internal Revenue Code created a wagering occupational tax for professional gamblers. People liable for the tax were required to register each year with the director of their local Internal Revenue district. The registration required disclosure of the registrant's name, residence and business address, a statement indicating whether the registrant was in the business of accepting

wagers, and a list of the names and addresses of the registrant's agents and employees. Marchetti, 390 U.S. at 42, 88 S.Ct. at 699, 19 L.Ed.2d at 894. Upon paying the occupational tax, registrants received revenue stamps, which they were obliged to post conspicuously at their principal place of business. In the absence of a principal place of business, registrants were to carry the stamps on their person subject to inspection on demand by Treasury officers. Registrants were also to maintain daily records and keep them available for inspection by Treasury officers. In turn, each principal Internal Revenue office was required to maintain a publicly available list of all registrants and to share certified copies of the list on request with any state or local prosecutor. Id. at 43, 88 S.Ct. at 700, 19 L.Ed.2d at 895.

In Grosso, a companion case to Marchetti, the issue was the status of the wagering excise tax, not the wagering occupation tax. People engaged in the wagering business,

and only those people, had to pay the wagering excise tax and file a return, disclosing "in the most direct fashion the fact of the taxpayer's wagering activities." Grosso at 65, 88 S.Ct. at 712, 19 L.Ed.2d at 910. There was no prohibition on the use of the information in the return, and the IRS, under no direct command either to disclose or withhold information, shared return information with law enforcement officials. Id. at 65-66, 88 S.Ct. at 712-13, 19 L.Ed.2d at 910-11.

In Haynes, the petitioner was convicted of failure to register a sawed-off shotgun with the Treasury Department as required by the National Firearms Act (the NFA). The NFA was designed to impose a tax on weapons used principally by people engaged in crime. Haynes at 87, 88 S.Ct. at 725, 19 L.Ed.2d at 926-27. Registration of sawed-off shotguns and other generally illegal weapons was required only if the registrant acquired the weapon unlawfully. The registration form required disclosure of the registrant's birth date, social security number, and record of

felony convictions. The Court stated the registration requirement was "directed principally at those persons who have obtained possession of a firearm without complying with the [NFA's] other requirements, and who therefore are immediately threatened by criminal prosecution." Id. at 96, 88 S.Ct. at 730, 19 L.Ed.2d at 932.

Finally, in Leary, the Court analyzed the Marihuana Tax Act, which had two main elements, a tax on transfers of marijuana and an occupational tax on those who engaged in marijuana dealing. Transfers of marijuana required an order form, which was to contain the names and addresses of the transferor and transferee, their registration numbers under the occupational tax requirements, and the amount of marijuana transferred. The IRS was required to keep the information contained on order forms available to state and local prosecutors. 395 U.S. at 14-15, 89 S.Ct. at 1536-37, 23 L.Ed.2d at 69-70.

The constitutional infirmities that plagued the statutory schemes in the Marchetti line of cases do not exist in the CSET. Indeed, the careful drafting of the CSET reveals that the legislature expressly sought to erect safeguards against self-incrimination.

B. The CSET

1. Disclosure of self-incriminating information

Simply put, the CSET does not require any self-incriminating information. The Cliffts claim that the very act of presenting oneself at a Department of Revenue office is incriminating because government officials can observe a taxpayer's appearance and obtain a description of the taxpayer. This may well be true, but it is irrelevant. The privilege against self-incrimination extends only to testimonial evidence, not to physical evidence such as appearance. See Pennsylvania v. Muniz (1990), 496 U.S. 582, 588-92, 110 S.Ct. 2638, 2643-45, 110 L.Ed.2d 528, 543-46 (and cases cited therein).

The Cliffts are correct that a person who delivers, possesses, or manufactures a controlled substance in violation of relevant state or federal law would incriminate himself by appearing at the Department of Revenue and declaring, "I possess X grams of Y drug, a Schedule Z controlled substance, and I wish to pay the CSET." The CSET, however, does not compel any possessor to make such an incriminating declaration.

The CSET "is due when the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of IC 35-48-4 or 21 U.S.C. 841 through 852. A person may not be required to reveal the person's identity at the time the tax is paid." I.C. 6-7-3-8 (emphasis added). When construing this language, the court's foremost goal is to ascertain and give effect to the true intention of the legislature. See Johnson County Farm Bureau Co-op. Ass'n., Inc. v. Indiana Dep't of State Revenue (1991), Ind. Tax, 568 N.E.2d 578, 580, aff'd (1992), 585

N.E.2d 1336. "In determining the legislative intent [of a statute], the language of the statute itself must be examined, including the grammatical structure of the clause or sentence in issue." Foremost Life Ins. Co. v. Dep't of Ins. (1980), 274 Ind. 181, 186, 409 N.E.2d 1092, 1096. See also Leehaug v. State Bd. of Tax Comm'rs (1991), Ind. Tax, 583 N.E.2d 211.

I.C. 6-7-3-8 states when CSET liability arises against "the person [who] receives delivery of, takes possession of, or manufactures a controlled substance." It does not state who is obligated to appear before a department official to actually tender the tax due. Instead, the statute simply states that "[a] person may not be required to reveal the person's identity at the time the tax is paid." Two points about this construction stand out in bold relief.

First, the juxtaposition of an indefinite article ("a") to modify who "may not be required to reveal," and a definite article ("the") to modify whose "identity" may not be revealed, leads necessarily to the inference that anyone, i.e., "a

person," may pay the tax for "the person" who owes the tax. In other words, the person liable for the tax may send an agent, who may not be required to divulge the principal's name, to pay the tax. Second, the prohibition against requiring the payor to reveal the identity of the liable person is written in the passive, rather than the active, voice. The phrase "at the time the tax is paid" leaves open the question "paid by whom?" and nowhere does the statute answer that question. See William Strunk Jr. and E.B. White, The Elements of Style 18 (3d ed. 1979) (discussing the uncertainty of passive constructions). Once again, the inference from the plain meaning of this language is that an agent may pay the tax.[61]

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[61] Moreover, when construing a statute, it is equally important to note what the statute does not say, as well as what it does say. Irmscher v. McCue (1987), Ind. App., 504 N.E.2d 1034, 1037. I.C. 6-7-3-8 does not say "a person may not be

Further, I.C. 6-7-3 lacks altogether any disclosure requirements, whether express or implied, beyond the weight and schedule of the controlled substance being taxed. Nowhere does I.C. 6-7-3 require anyone to disclose an address, a telephone number, a driver's license or other photo identification, a social security number, data about a transferor or transferee, details of an illegal transfer, the location of controlled substances or an illegal manufacturing facility, or any other information that might be subject to the privilege against self-incrimination. Indeed, so devoid is the CSET of any disclosure requirements that it is entirely conceivable the person liable could send an agent to pay the tax without even disclosing his or her name to the agent. This is in stark contrast to the detailed statutory disclosure schemes at issue in the Marchetti line of cases.

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required to reveal his identity (or that person's identity) at the time he (or that person) pays the tax."

The CSET does not require any person liable for the CSET to give self-incriminating evidence. Instead, it allows a person liable for the CSET to either pay in person or through an agent, and it prohibits the government from requiring the payor, whoever that payor may be, to divulge the name of the liable person. Of course, the CSET allows the scenario that the Cliffts postulate to occur, but it does not compel that scenario. The privilege against self-incrimination does not prevent a person from knowingly, intelligently, and voluntarily choosing to make self-incriminating statements; it prevents the government from compelling a person to make self-incriminating statements. See, e.g., Colorado v. Spring (1987), 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954. Assuming, arguendo, however, that the CSET does indeed compel self-incriminating statements, the issue becomes whether the immunity the CSET provides is sufficient to satisfy the Fifth Amendment.

2. Immunity

The privilege against self-incrimination generally prevents the government from compelling self-incriminating evidence. A properly asserted claim of the privilege may nonetheless be defeated if the government grants "an immunity . . . coextensive with the privilege being relinquished." State ex rel. Pollard v. Criminal Court of Marion County, Division One (1975), 263 Ind. 236, 263, 329 N.E.2d 573, 591 (citing; Kastigar v. United States (1972), 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212; Overman v. State (1923), 194 Ind. 483, 143 N.E. 604). See also, e.g., United States v. North (D.C. Cir., 1990), 910 F.2d 843, 853-54 (citing Kastigar), reh'g granted in part on other grounds (1991), 920 F.2d 940, cert. denied (1991), ____ U.S. ___, 111 S.Ct. 2235, 114 L.Ed.2d 477. To be valid, a grant of immunity must be coextensive with the privilege. Murphy v. Waterfront Comm'n (1964), 378 U.S. 52, 54, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678, 681. The question, then, is whether

the statutory immunity under the CSET is coextensive with the privilege.

> Three types of immunity may be granted a witness in exchange for his testimony: (1) transactional immunity: which prohibits the State from criminally prosecuting the witness for any transaction concerning that to which the witness testifies; (2) use immunity: where the testimony compelled of the witness may not be used at a subsequent criminal proceeding; and (3) derivative use immunity: whereby any evidence obtained as a result of the witness' compelled testimony may not be admitted against him in a subsequent prosecution.

In Re Caito (1984), Ind., 459 N.E.2d 1179, 1182-83 (emphasis in original) (citing Kastigar; In Re Contempt Findings Against Schultz (1981), Ind.App., 428 N.E.2d 1284). The protections of the privilege are broadly construed, Maness at 461, 95 S.Ct. at 592, 42 L.Ed.2d at 585, and the court is obligated to resolve all reasonable doubts in favor of constitutionality. State Line Elevator, 528

N.E.2d at 503 (citing Bunker v. Nat'l Gypsum Co. (1982), Ind., 441 N.E.2d 8, 11, appeal denied, 460 U.S. 1076, 103 S.Ct. 1761, 76 L.Ed.2d 338).

I.C. 6-7-3-9 contains two sentences and provides, "[t]he payment of the tax under this chapter does not make the buyer immune from criminal prosecution. However, confidential information acquired by the department may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of this chapter." (Emphasis added). The first sentence of the statute denies transactional immunity, but transactional immunity provides broader protection than the privilege and is therefore not necessary to satisfy the Fifth Amendment. See Kastigar at 453, 92 S.Ct. at 1660-61, 32 L.Ed.2d at 222.

The second sentence is addressed to the use of "confidential information." The statute does not define "confidential," but because the CSET is a listed tax, IND.

CODE 6-8.1-1-1, it is subject to IND. CODE 6-8.1-7-1, which provides in pertinent part:

> Unless in accordance with a judicial order or as otherwise provided in this chapter, the department, its employees, former employees, counsel, agents or any other person may not divulge the amount of tax paid by any taxpayer, terms of a settlement agreement executed between a taxpayer and the department, investigation records, investigation reports, or any other information disclosed by the reports filed under provisions of the law relating to any of the listed taxes, including required information derived from a federal return . . . . (Emphasis added).

This language is sweeping in its scope and entails all the information the Department acquires when a CSET payment is made.

The confidential information the Department receives cannot be used "to initiate or facilitate prosecution." To "initiate" is "to begin or set going," while to "facilitate" is "to

make easier or less difficult." Webster's Third New Int'l Dictionary 1164, 812 (1981). This language prevents the government from using confidential information either to begin a prosecution (use immunity) or to ferret out additional incriminating evidence to facilitate a prosecution (derivative use immunity).[62] It is therefore coextensive with the scope of the privilege. See Kastigar at 453, 92 S.Ct. at 1660-61, 32 L.Ed.2d at 222.

The CSET does not compel a person liable for the CSET to reveal any self-incriminating information. But even so, the CSET grants use immunity and derivative use immunity over all the confidential information the Department

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[62] A state grant of immunity equally prevents a federal prosecution. Murphy at 77-79, 84 S.Ct. at 1609, 12 L.Ed. at 694-95.

acquires.[63] Therefore, the CSET does not violate the Fifth Amendment's privilege against self- incrimination.[64]

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[63] The Cliffts' counsel has presented an affidavit regarding the confidentiality provisions of the CSET. He paid $10.00 to the Department at the Indiana Government Center offices in Indianapolis as payment for 1 gram of a Schedule 5 substance. He avers he informed no one outside his office of his plan to pay the tax, but within two hours of the time he left the Department, a television reporter contacted him to discuss the payment. Affidavit of Andrew C. Matemowski. The inference counsel draws is that Department personnel, ignoring the confidentiality provisions, informed the reporter of counsel's acts.

The court need not enter into any speculation on this matter. Our supreme court and the United States Supreme Court have taken into account the possibility of improper prosecutorial use of immunized testimony. If evidence is revealed under a grant of immunity, the prosecution in related matters "bears the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the

II

The Cliffts next claim the CSET violates their equal protection rights under the Fourteenth Amendment by creating an unconstitutional exemption from the tax. They are mistaken.

"When determining whether state legislation violates the Fourteenth Amendment's equal protection guarantee, the

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compelled testimony." In Re Caito, 459 N.E.2d at 1184 (quoting Kastigar at 460, 92 S.Ct. at 1665, 32 L.Ed.2d at 226).

[64] For other decisions analyzing and upholding state controlled substance taxes against self-incrimination challenges, see State v. Durrant (1989), 244 Kan. 522, 769 P.2d 1174, cert. denied (1989), 492 U.S. 923, 109 S.Ct. 3254, 106 L.Ed.2d 600; Sisson v. Triplett (1988), Minn., 428 N.W.2d 565, State v. Davis (1990), Utah App., 787 P.2d 517. In each of these cases, the state statutory scheme was similar to Indiana's, and the courts noted the differences between the statutes under consideration and the statutes in the Marchetti cases.

level of scrutiny applied depends upon the classification made in the challenged legislation." Pazzaglia v. Review Bd. (1993), Ind.App., 608 N.E.2d 1375, 1377, trans. denied. If the classification does not involve either a suspect class or a fundamental right, the legislation will pass constitutional muster if the classification is "rationally related to a legitimate government purpose." Id. (citing Gary Community Mental Health Center, Inc. v. Indiana Dep't of Pub. Welfare (1987), Ind.App., 507 N.E.2d 1019, 1023). Suspect classifications include, among others, race and national origin, while fundamental rights concern matters such as freedom of speech and the right to vote. See Regan v. Taxation with Representation of Washington (1983), 461 U.S. 540, 547, 103 S.Ct. 1997, 2001-02, 76 L.Ed.2d 129, 137-38; Thomas v. Greencastle Community School Corp. (1992), Ind. App, 603 N.E.2d 190, 192. "Legislatures have especially broad latitude in creating classifications and

distinctions in tax statutes." Regan at 547, 103 S.Ct. at 2002, 76 L.Ed.2d at 138.

People who possess controlled substances are not a suspect class and no fundamental right is at issue. Therefore, the court will set- aside the legislative classification only if the Cliffts can show that no "state of facts may reasonably be conceived to justify it." Kleiman v. State (1992), Ind.App., 590 N.E.2d 660, 663 (citing Parker v. State (1980), Ind.App., 400 N.E.2d 796).[65] IND. CODE 6-7-3-5 provides:

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[65] The Cliffts suggest their arguments warrant the intermediate level of scrutiny generally applicable to sex or legitimacy based discriminatory classifications. See, e.g., Clark v. Jeter (1988), 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465, 471-72 (discussing intermediate scrutiny). They point to no authority however, and the court declines their suggestion. The rational basis test is applicable here. Pazzaglia, 608 N.E.2d at 1377.

> The controlled substance excise tax is imposed on controlled substances that are:
>
> (1) delivered;
> (2) possessed; or
> (3) manufactured;
>
> in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 852. The tax does not apply to a controlled substance that is distributed, manufactured, or dispensed by a person registered under IC 35-48-3.

(Emphasis added). I.C. 35-48-3 contains the registration requirements and limitations for physicians, pharmacists, dentists, pharmaceutical manufacturers, and others to legally possess, manufacture, distribute, and dispense controlled substances within Indiana. Specifically, IND. CODE 35-48-3-3(c) provides that "[p]ersons registered . . . to manufacture, distribute, dispense, or conduct research with controlled substances may possess, manufacture, distribute, dispense, or conduct research with those substances to the extent authorized by their registration and in conformity with the

other provisions of this chapter." (Emphasis added). The Cliffts argue that the CSET treats persons registered under I.C. 35-48-3 differently from the way it treats persons who are not registered under I.C. 35-48-3 and, therefore, violates equal protection. No detailed equal protection analysis is necessary to resolve the issue, however, because IC 6-7-3-5 does not discriminate.[66]

The court construes statutes dealing with the same subject matter harmoniously. Caylor-Nickel Clinic, P.C. v. Indiana Dep't of State Revenue (1991), Ind. Tax, 569 N.E.2d 765, 768 (citing Marion County Sheriff's Merit Board v. Peoples Broadcasting Corp. (1989), Ind., 547 N.E.2d 235, 237), aff'd (1992), Ind., 587 N.E.2d 1311. Moreover, the court must construe all statutes to support their

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[66] It is the court's duty to refrain from consideration of constitutional questions if there are other grounds on which to base a decision. Harlan Sprague Dawley, 605 N.E.2d at 1232.

constitutionality. Miller v. State (1987), Ind., 517 N.E.2d 64, 71.

In Tobias v. State (1985), Ind., 479 N.E.2d 508, our supreme court affirmed the conviction of a pharmacist, registered under I.C. 35-48-3, who had been convicted of Class A felony narcotics dealing under I.C. 35-48-4-1. The court expressly rejected the pharmacist's claim that his registration precluded the possibility he could violate I.C. 35-48-4. Id. at 511. Similarly, the United States Supreme Court has stated that 21 U.S.C. § 822(b), which is almost identical to I.C. 35-48-3-3(c), "is a qualified authorization of certain activities, not a blanket authorization of all acts by certain persons." United States v. Moore (1975), 423 U.S. 122, 131, 96 S.Ct. 335, 340, 46 L.Ed.2d 333, 341. See also Alarcon v. State (1991), Ind.App., 573 N.E.2d 477, trans. denied. The lesson is clear: a person registered under I.C. 35-48-3 is no more authorized to violate I.C. 35-48-4 or 21 U.S.C. 841 through 852 than a person who is not registered.

Because an I.C. 35-48-3 registration is a nullity as to activities and controlled substances beyond its scope, any person who delivers, possesses, or manufactures a controlled substance in violation I.C. 35-48-4 or 21 U.S.C. 841 through 852, is simply not "registered under IC 35-48-3" for purposes of the CSET. The CSET therefore does not discriminate between I.C. 35-48-3 registrants and non-registrants. There is no equal protection violation.

III

The Cliffts did not pay the CSET when it was due. Instead, the Department learned of the Cliffts' possession from law enforcement officials and assessed the CSET against the Cliffts pursuant to I.C. 6-7-3-13 as a jeopardy assessment under IND. CODE 6-8.1-5-3. If the Department issues a jeopardy assessment, and the assessment is not paid immediately, I.C. 6-8.1-5-3 authorizes the Department, without notice or hearing, to levy on and sell the property of the person against whom the assessment was made. The

Cliffts contend these procedures deprive them of their property in violation of their Fourteenth Amendment procedural due process rights.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Matthews v. Eldridge (1976), 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18, 32 (quoting Armstrong v. Manzo (1965), 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62). See also City of Mitchell v. Graves (1993), Ind.App., 612 N.E.2d 149, 152. "'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Matthews at 334, 96 S.Ct. at 902, 47 L.Ed.2d at 33 (quoting Cafeteria Workers v. McElroy (1961), 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230). It "is flexible and calls for such procedural protections as the particular situation demands." Id. (quoting Morrissey v.

Brewer (1972), 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484).

The court need not tarry long on the Clifft's claim because they have suffered no due process violation. The Cliffts protested the Department's November 9, 1992, jeopardy assessment. The Deaprtment held a hearing on March 5, 1993 and entered its letter of findings denying the protest on May 12, 1993. The Cliffts bring this appeal pursuant to IND. CODE 6-8.1-5-1 from that letter of findings. They have presented no evidence that the Department took any measures to collect on the jeopardy assessment, whether between November 9, 1992, and May 12, 1993, or since. Therefore, the Cliffts received an administrative hearing and judicial review prior to suffering any deprivation of their property: due process can require no more.

Furthermore, although the Department may proceed on a CSET or other jeopardy assessment without providing the taxpayer pre-deprivation notice or opportunity to be

heard, this court has the jurisdiction and authority to enjoin the Department's collection activities pending the initiation of an original tax appeal. IND. CODE 33-3-5-11(b); American Trucking Ass'n v. State (1987), Ind. Tax, 512 N.E.2d 920. The right to a meaningful hearing contemplates review in a court of competent jurisdiction. See McCallip v. State (1991), Ind.App., 580 N.E.2d 278, 279.

The moment a person receives a jeopardy assessment with its concomitant payment demand, and before a tax warrant is issued and collection efforts begin, the person assessed has the ability to seek injunctive relief from this court. This procedure allows for review in a meaningful time and a meaningful manner before a court of competent jurisdiction and satisfies due process.

IV

Finally, the Cliffts argue that the tax constitutes double jeopardy under the United States Supreme Court's recent decision in Department of Revenue v. Kurth Ranch

(1994), ___ U.S. ____, 114 S.Ct. 1937, 128 L.Ed.2d 767.[67] In Kurth Ranch, the Court for the first time subjected a tax statute to double jeopardy analysis, holding that Montana's Dangerous Drug Tax (DDT) was "a second punishment within the contemplation of [the Fifth Amendment] . . . ." Id., 114 S.Ct. at 1948, 128 L.Ed.2d at 782. Like the Cliffts, the Kurths cultivated marijuana. Like the Cliffts, the Kurths' marijuana was confiscated and the Kurths were arrested and prosecuted. Id., 114 S.Ct. 1942-43, 128 L.Ed.2d 774-75. The case reached the Supreme Court in the context of the Kurths' Chapter 11 bankruptcy proceedings.

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[67] The Fifth Amendment states that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . . " Through the Fourteenth Amendment, the prohibition against double jeopardy applies to the states. Benton v. Maryland (1969), 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707.

The Court analyzed the Montana scheme and found several features that led the majority to conclude the DDT was actually a punishment for double jeopardy purposes. First, the Court noted that taxes "are usually motivated by revenue-raising rather than punitive purposes." Id., 114 S.Ct. at 1946, 128 L.Ed.2d at 779. The DDT, however, while denominated as a tax, also had a strong deterrent purpose. Id. Second, the Court characterized the rate of the DDT applicable to marijuana (roughly eight times then current market value) as "remarkably high . . . ." Id. The DDT assessed on marijuana is the greater of $100 per ounce or 10 percent of market value. MONT. CODE ANN. § 15-25-111.[68] Third, the DDT was "conditioned on the commission

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[68] The Court acknowledged that "while a high tax rate and deterrent purpose lend support to the characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive." Kurth Ranch, 114 S.Ct. at 1947, 128 L.Ed.2d at 779. The presence of additional

of a crime. . . . [which is] 'significant of penal and prohibitory intent rather than the gathering of revenue.'" Kurth Ranch, 114 S.Ct. at 1947, 128 L.Ed.2d at 779-80 (quoting United States v. Constantine (1935), 296 U.S. 287, 295, 56 S.Ct. 223, 227, 80 L.Ed. 233).[69]

Fourth, although the DDT was imposed on "the possession and storage of dangerous drugs," MONT. CODE ANN. 15-25-111, the enforcement scheme did not mandate assessment, filing, and payment until arrest. Kurth Ranch, 114 S.Ct. at 1941-42, 1947, 128 L.Ed.2d at 773-74, 780. In other words, the DDT was "exacted only after the taxpayer has been arrested for the precise conduct that gives rise to

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unusual factors, however, persuaded the Court the DDT was a punishment.

[69] Not all taxes on controlled substances are conditioned on the commission of a crime. See id., 114 S.Ct. at 1947, n.19, 20, 128 L.Ed.2d at 780, n.19, 20. The DDT, and as will be seen infra, the CSET, however, are conditioned expressly and solely on the violation of criminal statutes.

the tax obligation in the first place." Id., 114 S.Ct. at 1947, 128 L.Ed.2d at 780. Finally, the Court questioned the imposition of a tax based on possession when, in actuality, taxpayers were deprived of possession by the time of assessment. Because assessment occurred only after arrest, the authorities would have confiscated, and likely destroyed the drugs for which the DDT was due before assessment even occurred. Id., 114 S.Ct. at 1948, 128 L.Ed.2d at 780-81.

The CSET contains many of the same elements as Montana's DDT. First, the CSET has a deterrent purpose. The Department is required to give all CSET payors a receipt with the following language: "THIS EVIDENCE OF PAYMENT DOES NOT LEGALIZE THE DELIVERY, SALE, POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE. THE UNAUTHORIZED DELIVERY, SALE, POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE IS A CRIME." IND. CODE 6-7-3-10(a)

(emphasis in original). The Kurth Ranch court viewed similar admonitory language in the DDT's preamble as evidence of a deterrent purpose. Kurth Ranch, 114 S.Ct. at 1946, n.18, 128 L.Ed.2d at 779, n.18. Further, like revenue raised by the DDT, revenue from the CSET is to be channeled into drug abuse prevention and criminal investigation. See IND. CODE 6-7-3-16; MONT. CODE ANN. § 15-25-122.

Second, the Montana taxing authorities imposed the DDT against the Kurths at the rate of $100 per ounce, a rate roughly eight times the market value of a substantial portion of the marijuana taxed. Kurth Ranch, 114 S.Ct. at 1943, n.12, 128 L.Ed.2d at 775, n.12. The CSET on marijuana is $40 per gram, or $1,133.96 per ounce.[70] Therefore, using the same figures the Kurth Ranch court used, the CSET

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[70] One ounce equals 28.349 grams. Websters, supra, at 1424.

taxes marijuana at a rate of over ninety times market value.[71] As in Kurth Ranch, both of these factors "are at least consistent with a punitive character." Id., 114 S.Ct. at 1946, 128 L.Ed.2d at 779.

Third, like the DDT, the CSET is conditioned on the commission of a crime. The CSET "is imposed on controlled substances that are: (1) delivered; (2) possessed; or (3) manufactured; in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 852." I.C. 6-7-3-5 (emphasis added). Therefore, the only people subject to the CSET are those who, by definition, have engaged in criminal conduct.

Fourth, the CSET allows assessment after confiscation of the controlled substances on which the

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[71] In Kurth Ranch, the Court stated the rate of the DDT "appear[ed] to be unrivaled." Id., 114 S.Ct. at 1946, n.17, 128 L.Ed.2d at 779, n.17. The DDT has met its rival in the CSET, however, which has a rate per ounce of marijuana more than eleven times greater than the DDT's.

assessment is made. Indeed, this is precisely what occurred in the case at bar. After law enforcement authorities arrested and charged the Cliffts and confiscated the marijuana, they informed the Department of the Cliffts' identity and the number of grams of marijuana. At that point, the Department made its assessment, notwithstanding that the Kurths no longer possessed the marijuana at issue. Unlike the DDT, however, CSET assessment may also occur prior to arrest because the obligation to pay the tax arises on delivery, possession, or manufacture, and is not necessarily related to arrest.

Like the DDT, the CSET is an unusual tax, with elements of both taxation and punishment. It is not exactly like the DDT: assessment does not require arrest. The Kurth Ranch court, however, did not hold that a tax must contain each of the DDT's "punishment" aspects, or only the DDT's "punishment" aspects, to constitute a punishment within the meaning of the double jeopardy clause. Instead,

the Court held, "[t]aken as a whole, this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." Id., 114 S.Ct. at 1948, 128 L.Ed.2d at 781. Indeed, it could hardly be otherwise since each state and federal tax on the possession of controlled substances will differ from the next, as the CSET differs from the DDT.

Given the strong similarities between the DDT and the CSET, coupled with the Kurth Ranch court's decision not to lay down a definitive test, the court views Kurth Ranch as controlling. Therefore, the court holds the CSET is a punishment, which "must be imposed during the first prosecution or not at all." Id., 114 S.Ct. at 1948, 128 L.Ed.2d at 782.

CONCLUSION

The CSET does not violate the privilege against self-incrimination, the right of equal protection, or the right of due

process. Because there is no genuine issue of material fact on these questions and the Department is entitled to judgment as a matter of law, the court now GRANTS the Department's cross motion for partial summary judgment in part.

The CSET, however, is a punishment for double jeopardy purposes. Therefore, the Department may not collect the tax from Mrs. Clifft, who has already pled guilty to Class A misdemeanor possession.[72] On the other hand,

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[72] This appeal, like Kurth Ranch, "does not raise the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." Kurth Ranch, 114 S.Ct. at 1947, n.21, 128 L.Ed.2d at 780, n.21. See also id., 114 S.Ct. at 1958-59, 128 L.Ed.2d at 794 (Scalia, J. dissenting).

The date of the tax assessment, however, does not control. The Kurths were arrested in October 1987, and the Montana Department of Revenue assessed the DDT against the Kurths on December 7, 1987. See In re Kurth Ranch (1990), Bankr.

because jeopardy has not attached in any criminal action against Mr. Clifft, double jeopardy does not bar collection of the tax from him. There is no genuine issue of material fact on this question, and Mrs. Clifft is entitled to judgment as a

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D. Mont., 145 B.R. 61, 67. The Kurths did not plead guilty on the criminal charges related to the DDT until July 1988. See Kurth Ranch, 114 S.Ct. at 1942, 128 L.Ed.2d at 774; In re Kurth Ranch (1993), 9th Cir., 986 F.2d 1308, 1310. In this case, Mrs. Clifft was arrested on October 8, 1992 and assessed on November 9, 1992. The municipal court accepted her plea agreement on January 14, 1993.

The court notes that related issues have begun working their way through the courts. A few weeks after the Kurth Ranch decision, in an opinion not yet released for publication, a divided Texas Court of Appeals panel held double jeopardy barred a criminal trial after a pretrial civil forfeiture was assessed from the defendant. Fant v. State (filed July 31, 1994), No. A14-94-00013-CR, Tx.App. Houston (14th Dist.), 1994 WL 377748.

matter of law. The court therefore GRANTS the Cliffts' cross motion for partial summary judgment in part.[73]

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[73] In addition to their state constitutional claims, the CLiffts also raised issues regarding the Fourth and Eight Amendment claims, as well as a claim under 42 U.S.C. § 1983. These were not included within the summary judgment motions, however, and remain for trial.

February 22, 1993

Attn.: Jim Riley
Director of Protest Review Board
Indiana Department of State Revenue
Tax Policy and Appeals Div.
100 N. Senate Ave., Room N248
Indianapolis, IN 46204

Re: Protest of Jeopardy Finding;
Jeopardy Assessment Notice and Demand
File # L93-0215-49-41
Keith A. Hall and Mary C. Hall

Dear Mr. Riley:

Keith A. Hall and Mary C. Hall hereby make their formal written protest of the Jeopardy Finding; Jeopardy Assessment Notice and Demand issued on February 16, 1993, in the above-listed number and respectfully request an evidentiary hearing and opportunity to be heard, and further, that any tax levy on their wages, bank accounts, tax refunds,

or real or personal property be stayed until a decision is made after said hearing.

The Halls protest the Jeopardy Finding and Assessment Notice and Demand for the reasons that they did not knowingly violate any provision of the Indiana Statutes as they relate to any unlawful controlled substances. In addition, the Halls assert that said action by the Indiana Department of Revenue violates their Federal and State Constitution rights under the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution and Article I, Sections 1, 11, 12, 13, 14, 16, and 21 of the Indiana Constitution, and therefore, such Department action is contrary to law.

LETTER OF FINDING

CONTROLLED SUBSTANCE EXCISE TAX

FOR TAX YEAR 1992

TAXPAYER: KEITH AND MARY HALL
8909 COX ROAD
INDIANAPOLIS, INDIANA 46241

NUMBER: 93-0198
ISSUED: MAY 25, 1993

An administrative hearing was held May 14, 1993 at 10:00 a.m. The taxpayer was represented by attorneys Stephen Dillon and Andrew Maternowski. Representing the Department was R. Scott Partenheimer, Attorney.

ISSUES

I. Controlled Substance Excise Tax - Constitutional Issues

Authority: IC 6-7-3

Taxpayers protest the assessment of the controlled substance excise tax as violative of the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution and Article I, Section 1, 11, 12, 13, 14, 16 and 21 of the Indiana Constitution.

* * *

I. **Controlled Substance Excise Tax - Constitutional Issues**

DISCUSSION

The taxpayers protest the assessment of the controlled substances excise tax as violative of their federal and state constitutional rights.

FINDING

The taxpayers' protest is denied. The Department presumes the constitutionality of tax assessments of provisions under Indiana Code 6-7-3.

IN THE

INDIANA TAX COURT

KEITH AND MARY HALL,	)
	)
Petitioners,	)
	)
v.	)
	)
INDIANA DEPARTMENT OF STATE REVENUE and KENNETH L. MILLER, COMMISSIONER,	)
	)
Respondents.	)

PETITION TO SET ASIDE FINAL DETERMINATION

(Original Tax Appeal)

Come now the Taxpayers, Keith and Mary Hall, by counsel, Andrew C. Maternowski and Stephen W. Dillon, and pursuant to **I.C. 33-3-5-11** and **Indiana Tax Court Rule 3(A)** initiate this **Original Tax Appeal** and petition the Court to set aside the final determination of the Indiana Department of State Revenue in the above-captioned matter.

I. Original Tax Appeal

For their **Original Tax Appeal** the Taxpayers say:

* * *

6. That the Taxpayers demand an appeal of the D.O.R.'s denial of their protest on the following grounds:

a.) **I.C. 6-7-3** is unconstitutional in that it violates the Taxpayers' rights against self-incrimination guaranteed to them by the Fifth Amendment to the United States Constitution and Article I, Section 14 of the Indiana Constitution.

b.) **I.C. 6-7-3** is unconstitutional in that it violates the Taxpayers' rights against double jeopardy guaranteed to them by the Fifth Amendment to the United States Constitution and Article I, Section 14 of the Indiana Constitution.

IN THE

INDIANA TAX COURT

KEITH AND MARY HALL,	)
	)
	)
Taxpayers-Petitioners-Plaintiffs,	)
	)
vs.	)
	)
INDIANA DEPARTMENT OF REVENUE	)
and	)
KENNETH L. MILLER, COMMISSIONER,	)
	)
Respondents-Defendants.	)

Case No.: 49T10-9306-TA-36

MOTION FOR PARTIAL SUMMARY JUDGMENT

ON ISSUES OF THE CONSTITUTIONALITY OF I.C. 6-7-3

Come now the Petitioners, Keith and Mary Hall, by counsel, Andrew C. Maternowski, and pursuant to Trial Rule 56 move the Court for partial summary judgment on the issues of the constitutionality of I.C. 6-7-3. In support hereof the Petitioners say:

1. That there are no genuine issues of material fact in dispute on the following issues raised by the Petitioners' constitutional challenges to I.C. 6-7-3:

(a) Whether I.C. 6-7-3 on its face violates the prohibition against self-incrimination;

(b) Whether I.C. 6-7-3 on its face violates the Double Jeopardy Clause;

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WHEREFORE, the Petitioners move this Court for summary judgment on the issue of whether or not I.C. 6-7-3 is unconstitutional and for all other relief just and proper in the premises.

IN THE

INDIANA SUPREME COURT

KEITH AND MARY HALL,	)
	)
	)
Taxpayers-Petitioners-Plaintiffs,	)
	)
vs.	)
	)
INDIANA DEPARTMENT OF REVENUE	)
and	)
KENNETH L. MILLER, COMMISSIONER,	)
	)
Respondents-Defendants.	)

Case No.: 49T10-9306-TA-36

PETITION FOR REVIEW

Come now the Taxpayers, Keith and Mary Hall, by counsel, Andrew C. Maternowski, and pursuant to **Ind. Appellate Rule 18(D)** petition the Supreme Court to review the written opinion of the Tax Court herein. In support hereof the Taxpayers say:

1. That on October 11, 1994, the Tax Court, in a written opinion, decided this matter against the Taxpayers to

the extent it denied the Taxpayers' motion for summary judgment with regards to the following issues:

(a) Whether I.C. 6-7-3 violates the Taxpayers' rights against self-incrimination.

* * *

3. That the Tax Court's opinion is in error in that:

(a) The opinion erroneously decided a new question of law regarding the Taxpayers' contention that I.C. 6-7-3 violated the Taxpayers' rights against self-incrimination.

Specifically, the Tax Court erred in holding that requiring a Taxpayer to pay the Controlled Substance Excise Tax (CSET) did not force the Taxpayer to incriminate themselves.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. V

The Fifth Amendment to the Constitution of the United States provides in pertinent parts as follows:

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself * * *."

Indiana Controlled Substance Excise Tax Statutes

6-7-3-1 "Controlled substance" defined

Sec. 1. As used in this chapter, "controlled substance" has the meaning set forth in IC 35-481-9.

6-7-3-3 "Department" defined

Sec. 3. As used in this chapter, "Department" refers to the department of state revenue.

6-7-3-5 Imposition of tax; exemption

Sec. 5. The controlled substance excise tax is imposed on controlled on substances that are:

(1.) delivered;

(2.) possessed; or

(3.) manufactured;

in Indiana in violation of IC 35-48-4 or 21 U.S.C. 852. The tax does not apply to a controlled substance that is distributed, manufactured, or dispensed by a person registered under IC 35-48-3.

6-7-3-8 Payment of tax due on violation of state or federal laws, non-disclosure of identity of taxpayer

Sec. 8. The tax imposed under this chapter is due when the person receives delivery of , takes possession of , or manufactures a controlled substance in violation of IC 35-48-4 or U.S.C. 841 through 21 U.S.C. 852. A person may not be required to reveal the person's identity at the time the tax is paid.

6-7-3-9 Payment of tax not conferring criminal immunity; use of confidential information

Sec. 9. The payment of the tax under the chapter does not make the buyer immune from criminal prosecution. However, confidential information acquired by the department may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of this chapter.

6-7-3-11 Prohibited acts; failure or refusal to pay tax; penalty; crimes and offenses; exemption

Sec. 11. (a.) A person may not deliver, possess, or manufacture a controlled substance subject to the tax under this chapter unless the tax has been paid. A person who fails or refuses to pay the tax imposed by this chapter is subject to a penalty of one hundred percent (100%) of the tax in addition to the tax.

(b.) A person who knowingly or intentionally delivers, possesses, or manufactures a controlled substance without

having paid the tax commits a Class D felony. This subsection does not apply to a person in violation if IC 35-48-4-11, if the violation is a Class A misdemeanor.

6-7-3-13 Jeopardy assessment; duties of the department

Sec. 13. An assessment of the tax under this chapter is considered a jeopardy assessment. The department shall demand immediate payment and take action to collect the tax due as provided by IC 6-8.1-5-3.

6-8.1-1-1 "Listed taxes" or "taxes"

Sec. 1. "Listed taxes" or "taxes" includes... the controlled substance excise tax (IC 6-7-3).

6-8.1-7-1 Disclosure of information

Sec. 1. (a.) This subsection does not apply to the disclosure of information concerning a conviction on a tax evasion charge. Unless in accordance with a judicial order or otherwise provided in this chapter, the department, it's employees, counsel, agents, or any other person may not

divulge the amount of tax paid by any taxpayer and the department, investigators records, investigation reports, or any other information disclosed by the reports filed under the provisions of the law relating to any of the listed taxes, including required information derived from a federal return, except to:

(1.) members and employees of the department;

(2.) the governor;

(3.) the attorney general or any other legal representative of the state in any action in respect to the amount of tax due under the provisions of the law relating to any of the listed taxes; or

(4.) any authorized officers of the United States; when it is agreed that the information is to be confidential and to be used solely for official purposes.

(b.) The information described in subsection (a) may be revealed upon the receipt of a certified request of any designated officer of the state tax department of any other

state, district, territory, or possession of the United States when:

(1.) the state, district, territory, or possession permits the exchange of like information with the taxing officials of the state; and

(2.) it is agreed that the information is to be confidential and to be used solely for tax collection purposes.

6-8.1-7-3 Violation; offense

Sec. 3. A person who violates the provisions of this chapter commits a Class C misdemeanor. In addition, if the person is an officer or an employee of the state, he shall be immediately dismissed from his office or employment.

Internal Revenue Code Provisions

26 U.S.C. § 6050I Returns relating to cash received in trade or business, etc.

(a) Cash receipts of more than $10,000. Any person-

(1) who is engaged in trade or business, and

(2) who, in the course of such a trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),

shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

(b) Form and manner of returns. A return is described in this subsection if such return-

(1) is in such form as the Secretary may prescribe,

(2) contains-

(A) the name, address, and TIN of the person from whom the cash was received,

(B) the amount of cash received,

(C) the date and nature of the transaction, and

(D) such other information as the Secretary may prescribe.

***

(f) Structuring transactions to evade reporting requirements prohibited. (1) In general. No person shall for the purpose of evading the return requirements of this section-

(A) cause or attempt to cause a trade or business to fail to file a return required under this section,

(B) cause or attempt to cause a trade or business to file a return requires under this section that contains a material omission or misstatement of fact, or

(C) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more trades or businesses.

(2) Penalties. A person violating paragraph (1) of this subsection shall be subject to the same civil and criminal sanctions applicable to a person which fails to file or completes a false or incorrect return under this section.

26 U.S.C. § 7203. Willful failure to file return, supply information, or pay tax.

Any person requires under this title to pay any estimated tax or tax, or requires by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom

there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 60501, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

January 4, 1993

Mr. Andrew C. Maternowski

Dillon Law Office

3601 North Pennsylvania Street

Indianapolis, Indiana 46205-3435

Dear Mr. Maternowski:

Your letter dated December 18, 1992, directed to Commissioner Miller, has been forwarded to me for a response. The Internal Revenue Service does indeed require the Department of Revenue to file an information return (Form 8300) when we receive cash payments in excess of $10,000 in one or a series of related transactions. If you desire additional information, I would suggest that you contact Brian Sweet at the Internal Revenue Service. Mr. Sweet's phone number is 226-7553. He will be better able to give you an Internal Revenue Service perspective on your

concerns. If you need additional information from the Department, please do not hesitate to contact me.

Very truly yours,

/s/Stan Pinegar

Stanley C. Pinegar

Counsel to the Commissioner

Form **8300**

(Rev. August 1994)

Department of the Treasury
Internal Revenue Service

Report of Cash Payments Over $10,000 Received in a Trade or Business

► See instructions for definition of cash.

Please type or print.

OMB No. 1545-0892

1 Check appropriate boxes if: a ☐ amends prior report; b ☐ suspicious transaction.

Part I Identity of Individual From Whom the Cash Was Received

2 If more than one individual is involved, see instructions and check here . . . . . ► ☐

3 Last name	4 First name	5 M.I.	6 Social security number

7 Address (number, street, and apt. or suite no.)	8 Date of birth (see instructions)

9 City	10 State	11 ZIP code	12 Country (if not U.S.)	13 Occupation, profession, or business

14 Method used to verify identity: a Describe identification ► .....
b Issued by c Number

Part II Person (See Definitions) on Whose Behalf This Transaction Was Conducted

15 If this transaction was conducted on behalf of more than one person, see instructions and check here . . . . . ► ☐

16 Individual's last name or Organization's name	17 First name	18 M.I.	19 Social security number

20 Doing business as (DBA) name (see instructions)

Employer identification number

21 Alien identification: a Describe identification ► .....
b Issued by c Number

22 Address (number, street, and apt. or suite no.)	23 Occupation, profession, or business

24 City	25 State	26 ZIP code	27 Country (if not U.S.)

Part III Description of Transaction and Method of Payment

28 Date cash received	29 Total cash received	30 If cash was received in more than one payment, check here . . . ► ☐	31 Total price if different from item 29
	$ .00		$ .00

32 Amount of cash received (in U.S. dollar equivalent) (see instructions):

a U.S. currency $ .00 (Amount in $100 bills or higher $ .00)
b Foreign currency .00 (Country ►)
c Cashier's check(s) .00
d Money order(s) .00
e Bank draft(s) .00
f Traveler's check(s) .00

Issuer's name(s) and serial number(s) of the monetary instrument(s) ► .....

33 Type of transaction

a ☐ personal property purchased
b ☐ real property purchased
c ☐ personal services provided
d ☐ business services provided
e ☐ intangible property purchased
f ☐ debt obligations paid
g ☐ exchange of cash
h ☐ escrow or trust funds
i ☐ other (specify) ►

34 Specific description of property or service shown in 33. (Give serial or registration number, address, etc.)

► .....

Part IV Business That Received Cash

35 Name of business that received cash	36 Employer identification number

Social security number

37 Address (number, street, and apt. or suite no.)	

38 City	39 State	40 ZIP code	41 Nature of your business

42 Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

Sign Here

(Authorized signature of business that received cash)	(Title)	(Date signed)	( ) (Telephone number of business)

Multiple Parties

(Complete applicable parts below if box 2 or 15 on page 1 is checked)

Part I **Continued—Complete if box 2 on page 1 is checked**

3 Last name	4 First name	5 M.I.	6 Social security number
7 Address (number, street, and apt. or suite no.)			8 Date of birth (see instructions)

9 City	10 State	11 ZIP code	12 Country (if not U.S.)	13 Occupation, profession, or business

14 Method used to verify identity: a Describe identification ▶ .....
b Issued by c Number

3 Last name	4 First name	5 M.I.	6 Social security number
7 Address (number, street, and apt. or suite no.)			8 Date of birth (see instructions)

9 City	10 State	11 ZIP code	12 Country (if not U.S.)	13 Occupation, profession, or business

14 Method used to verify identity: a Describe identification ▶ .....
b Issued by c Number

Part II **Continued—Complete if box 15 on page 1 is checked**

16 Individual's last name or Organization's name	17 First name	18 M.I.	19 Social security number
20 Doing business as (DBA) name (see instructions)			Employer identification number
21 Alien identification: a - Describe identification ▶ ..... b Issued by c Number			
22 Address (number, street, and apt. or suite no.)			23 Occupation, profession, or business

24 City	25 State	26 ZIP code	27 Country (if not U.S.)

16 Individual's last name or Organization's name	17 First name	18 M.I.	19 Social security number
20 Doing business as (DBA) name (see instructions)			Employer identification number
21 Alien identification: a Describe identification ▶ ..... b Issued by c Number			
22 Address (number, street, and apt. or suite no.)			23 Occupation, profession, or business

24 City	25 State	26 ZIP code	27 Country (if not U.S.)

Item You Should Note

The term "cash" includes cashier's checks, bank drafts, traveler's checks, and money orders under certain circumstances. See the **Definitions** section of these instructions and Regulations section 1.6050I-1 for more details.

General Instructions

Who Must File.—Each person engaged in a trade or business who, during that trade or business, receives more than $10,000 in cash in one transaction or two or more related transactions, must file Form 8300. Any transactions conducted between a payer (or its agent) and the recipient in a 24-hour period are related transactions. Transactions are considered related even if they occur over a period of more than 24 hours if the recipient knows, or has reason to know, that each transaction is one of a series of connected transactions. This form may be filed voluntarily for any suspicious transaction (see **Definitions**), even if it does not exceed $10,000.

Exceptions.—Cash is not required to be reported if it is received:

- By a financial institution required to file **Form 4789,** Currency Transaction Report.
- By a casino required to file (or exempt from filing) **Form 8362,** Currency Transaction Report by Casinos, (except for cash received in nongaming businesses).
- By an agent who receives the cash from a principal, if the agent uses all of the cash within 15 days in a second transaction that is reportable on Form 8300 or on Form 4789, and discloses all the information necessary to complete Part II of Form 8300 or Form 4789 to the recipient of the cash in the second transaction.
- In a transaction that occurs entirely outside the United States. See **Pub. 1544,** Reporting Cash Payments Over $10,000 (Received in a Trade or Business), regarding transactions occurring in Puerto Rico, the Virgin Islands, and territories and possessions of the United States.
- In a transaction that is not in the course of a person's trade or business.

When and Where To File.—File Form 8300 by the 15th day after the date the cash was received. If that date falls on a Saturday, Sunday, or legal holiday, you may file the form on the next business day. File the form with the Internal Revenue Service, Detroit Computing Center, P.O. Box 32621, Detroit, MI 48232, or hand carry it to your local IRS office. Keep a copy of each Form 8300 for 5 years from the date you file it.

Statement To Be Provided.—You must provide a written statement to each person named in a required Form 8300 on or before January 31 of the year following the calendar year in which the cash is received. The statement must show the name and address of the business, the total amount of reportable cash received, and that the information was furnished to the IRS. Keep a copy of the statement for your records.

Multiple Payments.—If you receive more than one cash payment on a single transaction or on related transactions, you must report the multiple payments any time you receive a total amount in cash payments that exceeds $10,000 within any 12-month period. Report the amount received within 15 days of the date you receive the payment that causes the total amount to exceed $10,000. (If more than one report is required within 15 days, you may file a combined report. File the combined report no later than the date the earliest report, if filed separately, would be required to be filed.)

Taxpayer Identification Number (TIN).—You are required to furnish the correct TIN of the person or persons from whom you receive the cash and the person or persons on whose behalf the transaction is being conducted, if the transaction is being conducted on behalf of another person or persons. You may be subject to penalties for an incorrect or missing TIN. The TIN for an individual is the individual's social security number. For other persons, including corporations, partnerships, and estates, it is the employer identification number. (See Pub. 1544 regarding exceptions for furnishing TINs of certain nonresident alien individuals and foreign organizations.)

Penalties.—If you are required to file a return, you may be subject to penalties if you fail to file a correct and complete return on time and you cannot show that the failure was due to reasonable cause. You may also be subject to penalties if you fail to furnish a correct and complete statement to each person named in a required report on time. More severe penalties (minimum $25,000) may be imposed if the failure is due to an intentional disregard of the cash reporting requirements. In addition, penalties may be imposed for causing (or attempting to cause) a trade or business to fail to file a required report, for causing (or attempting to cause) a trade or business to file a required report containing a material omission or misstatement of fact, or for structuring (or attempting to structure) transactions to avoid the reporting requirements. These violations may also be subject to criminal prosecution which, upon conviction, may result in imprisonment (up to 5 years) or fines (up to $250,000 for individuals and $500,000 for corporations) or both.

Definitions

Cash.—The term "cash" means the following:

- U.S. and foreign coin and currency received in any transaction.
- A cashier's check, bank draft, traveler's check, or money order having a face amount of not more than $10,000 received in a **Designated Reporting Transaction** as defined below, or received in any transaction in which the recipient knows that such instrument is being used in an attempt to avoid the reporting of the transaction under section 6050I.

Note: *Cash does not include a check drawn on the payor's own account, such as a personal check, regardless of the amount.*

Designated Reporting Transaction.—A retail sale (or the receipt of funds by a broker or other intermediary in connection with a retail sale) of a consumer durable, a collectible, or a travel or entertainment activity.

Retail sale.—Any sale (whether or not the sale is for resale or for any other purpose) made in the course of a trade or business if that trade or business principally consists of making sales to ultimate consumers.

Consumer durable.—An item of tangible personal property of a type suitable under ordinary usage for personal consumption or use that can reasonably be expected to be useful for at least 1 year under ordinary usage, and that has a sales price of more than $10,000.

Collectible.—Any work of art, rug, antique, metal, gem, stamp, or coin.

Travel or entertainment activity.—An item of travel or entertainment that pertains to a single trip or event if the combined sales price of the item and all other items relating to the same trip or event that are sold in the same transaction (or related transactions) exceeds $10,000.

Exceptions.—A cashier's check, bank draft, traveler's check, or money order is not considered to be received in a designated reporting transaction if it constitutes the proceeds of a bank loan or if it is received as a payment on certain promissory notes, installment sales contracts, or down payment plans. See Pub. 1544 for more information.

Person.—Includes an individual, a corporation, a partnership, a trust, an estate, an association, or a company.

Recipient.—The person receiving the cash. Each branch or other unit of a person's trade or business is considered a separate recipient unless the branch

receiving the cash (or a central office linking the branches) has reason to know the identity of payers making cash payments to other branches.

Transaction.—Includes the purchase of property or services, the payment of debt, the exchange of a negotiable instrument for cash, and the receipt of cash to be held in escrow or trust. A single transaction may not be broken into multiple transactions to avoid reporting.

Suspicious Transaction.—The term "suspicious transaction" means a transaction in which it appears that a person is attempting to cause Form 8300 not to be filed, or a false or incomplete form to be filed, or where there is an indication of possible illegal activity.

Specific Instructions

Complete all parts. Skip Part II if the individual in Part I is conducting the transaction on his or her behalf only.

Item 1.—If you are amending a prior report, check box 1a. Complete the appropriate items with the amended or correct information only. Complete all of Part IV. Staple a copy of the original report to the amended report.

To voluntarily report a suspicious transaction (see **Definitions**), check box 1b. For a suspicious transaction, you may also telephone the local IRS Criminal Investigation Division. If you do not know the number, please call toll-free 1-800-800-2877.

Part I

Item 2.—If two or more individuals conducted the transaction you are reporting, check the box and complete Part I on any one of the individuals. Provide the same information on the other individual(s) on the back of the form. If more than three individuals are involved, provide the same information on additional sheets of paper and attach them to this form.

Item 6.—Enter the social security number of the individual named. See **Taxpayer Identification Number (TIN)** above.

Item 8.—Enter six numerals for the date of birth of the individual named. For example, if the individual's birth date is July 6, 1960, enter 07 06 60.

Item 13.—Use fully descriptive terms such as plumber or attorney instead of nondescriptive terms such as merchant, businessman, or self-employed.

Item 14.—You must verify the name and address of the individual identified. Verification must be made by examination of a document normally accepted as a means of identification when cashing checks (for example, a driver's license, passport, or other official document). In item 14a, enter the type of document used to verify the identification. In item 14b, identify the issuer of that document. In item 14c, enter the document's number. For example, if the individual has a Utah driver's license, enter "driver's license" in item 14a, "Utah" in item 14b, and its number in item 14c.

Part II

Item 15.—If the transaction is being conducted on behalf of more than one person (for example, if the individual in Part I is buying a vehicle on behalf of two persons), check the box and complete Part II on any one of the persons. Provide the same information requested in Part II on the other person(s) on the back of the form. If more than three persons are involved, provide the same information on additional sheets of paper and attach them to this form.

Items 16 Through 19.—If the person on whose behalf the transaction was conducted is an individual, complete items 16, 17, and 18. Enter his or her social security number (SSN) in item 19. If the individual is a sole proprietor and has an employer identification number (EIN), enter both the SSN and EIN in item 19. If the person is an organization, put its name in item 16 and its EIN in item 19.

Item 20.—If a sole proprietor or other organization named in items 16 through 18 is doing business under a name other than that entered in items 16-18, enter the doing business as (DBA) name here.

Item 21.—If the person is not required to furnish a TIN (see **Taxpayer Identification Number (TIN)**), complete this item. Enter a general description of the type of official document issued to that person in item 21a (e.g., "passport"), the country that issued the document in item 21b, and the document's number in item 21c.

Part III

Item 28.—Enter the date you received the cash. If you received the cash in more than one payment, enter the date you received the payment that caused the combined amount to exceed $10,000. Also, see **Multiple Payments.**

Item 30.—Check the box if the amount shown in item 29 was received in more than one payment, e.g., as installment payments (see **Multiple Payments**) or payments on related transactions.

Item 31.—Enter the total price of the property, services, amount of cash exchanged, etc. (e.g., the total cost of a vehicle purchased, cost of catering service, exchange of currency) if the total price is different from the amount shown in item 29.

Item 32.—Enter the dollar amount of each form of cash received (see the definition of **Cash**). Show amount of foreign items in U.S. dollars. (For cashier's check, bank draft, traveler's check, and/or money order, provide the name of the issuer and the serial number of each instrument.) The sum of the amounts must equal item 29.

Item 33.—Check the appropriate box(es) that describe the transaction. If the transaction is not specified in boxes a–h, check box i and briefly describe it (e.g., car lease, boat lease, house lease, aircraft rental).

Part IV

Item 36.—Enter the EIN of your business. Enter your SSN only if your business has no EIN.

Item 41.—Describe the nature of your business. Use descriptive terms (attorney, auto dealer, jewelry dealer) rather than nondescriptive terms (business, store).

Paperwork Reduction Act Notice

The requested information is useful in criminal, tax, and regulatory investigations, for instance by directing the Federal Government's attention to unusual or questionable transactions. Trades or businesses are required to provide the information under 26 U.S.C. 6050I.

The time needed to complete this form will vary depending on individual circumstances. The estimated average time is 21 minutes. If you have comments concerning the accuracy of this time estimate or suggestions for making this form more simple, you can write to both the **Internal Revenue Service,** Attention: Reports Clearance Officer PC:FP, Washington, DC 20224; and the **Office of Management and Budget,** Paperwork Reduction Project (1545-0892), Washington, DC 20503. DO NOT send this form to either of these offices. Instead, see **When and Where To File** on page 3.